FILED

No. 01 848 NOV 13 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MR. S. K. YOUNG, MR. A. P. HARVEY, MR. JANEWAY, MR. MILLIN, MR. SHORT, AND GENE JOHNSON,

Petitioners,

v.

DARNELL A. TOLES, #277464,

Respondent.

RON ANGELONE, STAN YOUNG, OFFICER JANEWAY, OFFICER KENDRICK, MAJOR YATES, ADAM HARVEY, OFFICER TAYLOR, OFFICER WYNN, OFFICER NUNLEY, OFFICER POWERS, ASST. WARDEN PHILLIPS, JEFFREY HEAD, OFFICER COLLINS, OFFICER SNIDER, OFFICER J. GILLEY, OFFICER SALYERS, OFFICER OLINGER, B. GILLIAM, M. BLEVINS, MS. SALYERS, B. RODGERS, OFFICER MANN AND R. MULLINS,

Petitioners,

v.

MICHAEL HANNON, #277238,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RANDOLPH A. BEALES
Attorney General
Commonwealth of Virginia
PAMELA A. SARGENT*
Senior Assistant Attorney General
SUSAN F. BARR
Assistant Attorney General
**Counsel of Record*
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219
(804) 786-4805

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

189 pp

QUESTION PRESENTED

Whether the refusal of the Fourth Circuit Court of Appeals to hear the certified interlocutory appeals was an abuse of discretion which sanctioned the district court's deliberate departure from the accepted and usual course of judicial proceedings by nullifying Congressional enactment, Supreme Court and court of appeals precedents, and the protection of immunity from suit?

PARTIES TO THE PROCEEDING

The parties in the first case ("Toles") are as listed in the caption. All are officers and employees of the Virginia Department of Corrections ("VDOC"), an agency of the Commonwealth of Virginia. In addition, intervenor United States through the U.S. Department of Justice was brought in pursuant to FRCP 24(c), to defend the challenge to the constitutionality of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc. The Respondent-Plaintiff, Darnell A. Toles, # 277464, is a Connecticut inmate, who was temporarily housed in a Virginia prison.

The parties in the second case ("Hannon") are as listed in the caption. All are officers and employees of the VDOC. The Respondent-Plaintiff, Michael Hannon, #277238, is a Connecticut inmate, who was temporarily housed in a Virginia prison. Both Toles and Hannon have now been returned to Connecticut.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Case	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Introduction	3
Statement of the Case	5
Reasons for Granting the Petition	8
I. The Fourth Circuit's Refusal To Hear The Appeals Renders Meaningless The PLRA's Protection From Suit	9
A. The District Court's Decisions Negate The PLRA	9
B. The Decisions Invite A Dramatic Increase In Prisoner Filings	11
II. The Decisions Conflict With Decisions Within The Districts And From Other Circuits	11
III. The Decisions Below Resolve A Federal Question In Direct Conflict With This Court's Precedents	12
A. The Fourth Circuit's Failure To Correct These Decisions Deprives Prison Officials Of Constitutional And Legislative Protections	12

TABLE OF CONTENTS – Continued

Page

B. The Fourth Circuit's Refusal To Hear The Appeals Leaves The Prison Officials With No Effective Remedy..... 14

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES:

Ashann-Ra v. Commonwealth, 112 F.Supp.2d 559 (W.D. Va. 2000) 14

Booth v. Churner, 532 U.S. 731 (2001) ... 2, 4, 8, 10, 11, 12

Chelette v. Harris, 229 F.3d 684 (8th Cir. 2000), *reh'g en banc denied*, 2000 U.S. App. Lexis 29604, *cert. denied*, 531 U.S. 1156 (2001) 12

DeBlasio v. Johnson, 128 F.Supp.2d 315 (E.D. Va. 2000), *aff'd*, 2001 U.S. App. LEXIS 14338 14

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 2

Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976) 15

Hartsfield v. Vidor, 199 F.3d 305 (6th Cir. 1999) 12

Hines v. South Carolina Dept. of Corrections, 148 F.3d 353 (4th Cir. 1998) 14

James v. Jacobson, 6 F.3d 233 (4th Cir. 1993) 15

Johnson v. True, 125 F.Supp.2d 186 (W.D. Va. 2000) 11

Koon v. United States, 518 U.S. 81 (1996) 15

Lipsett v. University of Puerto Rico, 740 F.Supp. 921 (D.P.R. 1990) 15

Marsh v. Jones, 53 F.3d 707 (5th Cir. 1995) 12

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 16

Mitchell v. Forsyth, 472 U.S. 511 (1985) 13, 14

Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999) 12

TABLE OF AUTHORITIES – Continued

Page

Siegert v. Gilley, 500 U.S. 226 (1991) 13

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 15

United States v. General Motors Corp., 323 U.S. 373 (1945) 2

Wright v. Morris, 111 F.3d 414 (6th Cir. 1997), *cert. denied*, 552 U.S. 906 (1997) 12

CONSTITUTION, STATUTES AND RULES:

28 U.S.C. §1254(1) 2

28 U.S.C. §1292(b) 2

42 U.S.C. §1983 ..... 2, 3, 5, 7

42 U.S.C. §1997e(a) 3, 8, 9, 10

42 U.S.C. §2000cc 3, 6

42 U.S.C. §2000cc-2(e) 14

F.R.C.P. 12(b)(1) 6, 7

F.R.C.P. 24(c) 6

JOINT PETITION FOR WRIT OF CERTIORARI

Mr. S. K. Young, Mr. A. P. Harvey, Mr. Janeway, Mr. Millin, Mr. Short, and Gene M. Johnson, the Defendants below in *Toles*, and Ron Angelone, Stan Young, Officer Janeway, Officer Kendrick, Major Yates, Adam Harvey, Officer Taylor, Officer Wynn, Officer Nunley, Officer Powers, Asst. Warden Phillips, Jeffrey Head, Officer Collins, Officer Snider, Officer J. Gilley, Officer Salyers, Officer Olinger, B. Gilliam, M. Blevins, Ms. Salyers, B. Rodgers, Officer Mann and R. Mullins, the Defendants below in *Hannon* (hereinafter the "Petitioners"), respectfully file this joint petition for writ of *certiorari* to review the judgments of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinions of the district court are unreported in both cases. Pet. App. 14, 22, 39. The opinions of the court of appeals are unreported in both cases. Pet. App. 1, 2, 32, 48.

JURISDICTION

The court of appeals denied the petition for rehearing/suggestion for rehearing in banc on August 21, 2001, in *Toles*, and on August 14, 2001, in *Hannon*. In both cases, the court of appeals refused without opinion to reconsider the panel's refusal without opinion to hear the certified interlocutory appeals objecting to the district

court's creation of the very "futility exception" rejected by this Court in *Booth v. Churner*, 532 U.S. 731 (2001).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petitioners seek review of the court of appeals' refusal to hear the certified interlocutory appeals, pursuant to 28 U.S.C. §1292(b), because the district court's decisions create issues that are "fundamental to the further conduct of the case," *Gillespie v. United States Steel Corp.*. 379 U.S. 148, 153 (1964) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)), as well as many others in the Fourth Circuit. In addition, the refusal by the court of appeals to hear the certified interlocutory appeals amounts to a sanctioning of the departure of the district court from the accepted and usual course of judicial proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. These actions were originally brought pursuant to 42 U.S.C. §1983, which states that:

> Every person who, under color of any statute, ordinance, Regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. The plaintiff in *Toles* was later permitted to amend his complaint to assert a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc.

3. 42 U.S.C. §1997e(a) provides, "No action shall be brought with respect to prison conditions under . . . [42 U.S.C. §1983] . . . by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted."

4. The Plaintiff in *Toles* challenged the applicability of a grooming policy of the Virginia Department of Corrections, Department Operating Policy 864, a neutral regulation of general application to all inmates.

5. The Plaintiff in *Hannon* filed a broad-ranging challenge to numerous conditions of confinement.

INTRODUCTION

These are extraordinary cases, both on the merits and because of their consequences.

On the merits, the district court's rulings creating a "futility exception" to the Prison Litigation Reform Act's ("PLRA") mandatory requirement of full exhaustion of inmate grievance remedies defies not only the plain language of the PLRA, 42 U.S.C. §1997e(a), but also this

Court's very recent declaration in *Booth v. Churner*, 532 U.S. 731, n. 6 (2001), " . . . we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."

The district court has wrongly focused on the grievance remedies "available" to inmates at the time their complaint is filed or when the court rules upon the motion to dismiss, rather than when their cause of action arises. The VDOC grievance policy, Department Operating Procedure 866 ("DOP 866"), Pet. App. 50, 61, requires inmates to file grievances within 30 days of the date of injury and to pursue their appeals through all available levels. Using the district court's focus, there will never be any "available" remedies since the time for filing a grievance is long since past by the time a complaint is filed. The district court's rulings then free all inmates from having to bother with timely filing grievances in all cases.

Prior to the decision in *Booth*, the district court issued different filing orders discussing exhaustion, Pet. App. 4, 9, and 34. In the *Hannon* case, rather than requiring him to prove full exhaustion of all claims in the lawsuit, the district court merely accepted unproven allegations and required the prison officials to respond, Pet. App. 34. However, after the decision in *Booth*, the district court has now adopted a new standard filing order in inmate cases, Pet. App. 89, advising state prison defendants that they may challenge exhaustion, but must also submit an "assertion" that "the plaintiff currently has available to him a grievance procedure through which he may address the matters complained of in the complaint." Since no inmate will have "currently available remedies" by the time his complaint is filed, the district court has

created an absolute barrier to the filing of a motion to dismiss for failure to exhaust.

The impact of this ruling is that the PLRA exhaustion provision has become a nullity. Congress enacted this provision to protect state prison officials from frivolous, harassing inmate litigation. However, as the record in *Toles* amply demonstrates, the state prison officials have been forced to undergo protracted litigation and discovery in a case in which the inmate did not exhaust his grievance remedies as to all claims through all available levels. The immunity from suit, and the freedom from protracted litigation, have been denied to the prison officials.

This inexplicable judicial hostility to the prophylactic purposes of the PLRA warrants *certiorari*.

STATEMENT OF THE CASE

Toles Petition

Toles involves one of many inmate challenges to the VDOC's grooming regulation, DOP 864. Plaintiff-Respondent Toles is an inmate convicted under the laws of Connecticut, who was housed at the Wallens Ridge State prison, a VDOC facility, pursuant to a contract between Connecticut and Virginia prison officials.

Toles originally filed his complaint only under 42 U.S.C. §1983, claiming a violation of the First and Fourteenth Amendments. He claims to be a Hebrew/Israelite/Nazarite, a religion which allegedly requires him never to

cut his hair or beard. DOP 864 does not have a religious exemption to the grooming policy: all inmates must comply or face assignment to segregation until they do comply. Toles sought declaratory and injunctive relief, and compensatory and punitive damages.

The Petitioners moved to dismiss pursuant to FRCP 12(b)(1), challenging the court's jurisdiction to hear the case due to Toles' failure to exhaust his inmate remedies. Toles had filed a grievance at the first level, but failed to appeal it to the next two levels; he, therefore, had not exhausted all available remedies. The district court denied the motion, finding that Toles had no remedies available to him at the time of ruling on the motion.

The district court then permitted Toles to amend his complaint to assert a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc. The Petitioners filed a second motion to dismiss, noting that the RLUIPA is subject to the provisions of the PLRA including exhaustion, and challenging the constitutionality of the RLUIPA; they requested the district court to give FRCP 24(c) notice to the United States Attorney General. The district court denied the motion to dismiss again, Pet. App. 20, 22.

The Petitioners sought leave to take an interlocutory appeal of the exhaustion ruling, which the court denied. However, the district court then "sua sponte" certified the issue for appeal, but refused to grant a stay pending action by the court of appeals, Pet. App. 27. The district court required the Petitioners to continue to litigate the issues in the case, to respond to discovery, and to face a trial date. On three day's notice, the district court

required the Petitioners to participate in a hearing regarding their constitutional challenge to the RLUIPA. The district court did not decide the threshold issue of the constitutionality of the RLUIPA, instead permitting the Petitioners to file an extensive motion for summary judgment. Only when Toles' prison in Connecticut advised that it did not have videoconferencing capability did the district court cancel the trial date; however, it still has not ruled upon the constitutional challenge or the summary judgment motion.

In the meantime, the Petitioners undertook the certified interlocutory appeal of the exhaustion ruling. A panel of the court of appeals refused the appeal, without reason, Pet. App. 1. The Petitioners sought rehearing/hearing in banc, which was also refused without reason, Pet. App. 32. This petition for *certiorari* timely followed.

Hannon Petition

Hannon involves a laundry list of complaints about prison conditions. He, too, was a Connecticut inmate temporarily housed in a Virginia prison. He filed his complaint only under 42 U.S.C. §1983, seeking declaratory and injunctive relief, and compensatory and punitive damages.

The Petitioners moved to dismiss pursuant to FRCP 12(b)(1), challenging the district court's jurisdiction to hear the case where the inmate had not exhausted his remedies as to all claims contained therein. The district court denied the motion, Pet. App. 37, finding that there was a material issue of fact as to whether Hannon had exhausted his claims but also stating that "[e]ven if I were

to find that the plaintiff had adequate access to the grievance procedure, inasmuch as Hannon is no longer incarcerated at WRSP and all of his claims concern actions occurring more than 30 days ago, dismissal would be inappropriate in that any attempt by Hannon to further exhaust such claims under the Adult Inmate Grievance Procedure would be futile." Pet. App. 44. Hannon, like Toles, had no remedies available to him at the time of filing his petition since the 30 day period for filing grievances had long since passed.

The Petitioners sought leave to take an interlocutory appeal, which the district court granted, Pet. App. 46. A panel of the court of appeals refused to hear the appeal, without reason, Pet. App. 2. The petitioners sought rehearing/hearing in banc which the court of appeals refused, again without reason, Pet. App. 48. This petition for *certiorari* timely followed.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three independently compelling reasons. First, the district court decisions, which are based on federal law, are of great importance because they in effect invalidate a federal statute, 42 U.S.C. §1997e(a). Second, they directly conflict with not only that statute but also this Court's decision in *Booth*; indeed, the decisions have caused conflicts among the courts of the Eastern and Western Districts of Virginia, and with other courts of appeals. Third, the refusal of the court of appeals to hear the cases renders null and void

Congressional intent and principles of *stare decisis* and immunity.

I. THE FOURTH CIRCUIT'S REFUSAL TO HEAR THE APPEALS RENDERS MEANINGLESS THE PLRA'S PROTECTION FROM SUIT.

The Petitioners do not take the extraordinary step of seeking *certiorari* lightly. However, they are compelled to do so by the impact the district court's decisions, and the court of appeals' refusal to rectify them, will cause in all inmate litigation in the states of the Fourth Circuit.

A. THE DISTRICT COURT'S DECISIONS NEGATE THE PLRA.

The Court need only look to the record in these cases to see the damage caused by the district court's decisions.

42 U.S.C. §1997e(a) mandates complete exhaustion of all available inmate grievance remedies before an inmate may file suit in district court ("No action shall be brought . . . "). By artificially engrafting a requirement that grievance remedies be available when suit is filed rather than when the cause of action arises, the district court has guaranteed that no inmate need comply with the exhaustion requirement at all. Indeed, the district court has sought to interpose its discretion for that of the Virginia prison officials and has in effect attempted to eliminate the 30 day filing period for filing grievances. Per VDOC policy, Pet. App. 61, an inmate must file his grievance within 30 days of his injury, and since the 30 day period assuredly has run by the time the inmate files

suit, no inmate can possibly have any remedies "available" by the time he files suit. The district court's rulings have given all inmates a free pass of the exhaustion requirement, completely eliminated the PLRA's protection from suit on unexhausted claims, and improperly interfered with the VDOC's administration of its prisons.

While one would have thought that this Court's decision in *Booth v. Churner*, 532 U.S. 731 (2001), would end any questions in this area, sadly, this is not the case. Toles, like *Booth*, filed only the first level grievance and failed to pursue it through the two remaining levels. Hannon fully exhausted some of his claims and others were totally unexhausted. Yet after the *Booth* decision was pronounced, the district court has now changed its standard filing order in inmate pro se cases. As Pet. App. 89 amply demonstrates, the district court raises the vain hope of asserting an effective exhaustion defense yet snatches it away with the requirement that the defendants file an "assertion" that the inmate has currently available remedies as to the claims in the lawsuit. The only conclusion which can be reached is that the district court has no intention of following either clear statutory requirement, 42 U.S.C. §1997e(a), nor this Court's equally clear directive in *Booth*, n. 6 " . . . we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."

B. THE DECISIONS INVITE A DRAMATIC INCREASE IN PRISONER FILINGS.

The PLRA was implemented solely to stem the flood of frivolous inmate litigation. The exhaustion requirement is one of the linchpins of this legislation. Cases with unexhausted claims are to be screened and dismissed without requiring a response from the defendants. Here, the district court has virtually eliminated the exhaustion requirement, thus guaranteeing an increase in prisoner filings. These unsupportable decisions warrant intervention by this Court.

II. THE DECISIONS CONFLICT WITH DECISIONS WITHIN THE DISTRICTS AND FROM OTHER CIRCUITS.

The need for controlling guidance from this Court could not be more clear. The frequency with which this issue continues to arise and its inconsistent treatment by the district courts within the Fourth Circuit is astounding.

The Western District of Virginia has issued this troublesome ruling in several cases; *see* Pet. App. 92, 94, 99, 101. Indeed, it has delivered a published ruling creating the futility exception, *Johnson v. True*, 125 F.Supp.2d 186 (W.D. Va. 2000), Pet. App. 109, on which other federal courts in Virginia have relied. However, both the Western and Eastern Districts have upheld the exhaustion requirement in other cases; *see* Pet. App. 118, 129, 131, 133, 134, 136, 138, 140, 141, 145.

Once again, the *Booth* ruling has not solved this problem. After being advised of this decision, the Richmond

Division of the Eastern District refused to dismiss for failure to exhaust, while the Norfolk Division of the Eastern District properly followed *Booth* and dismissed the case; *see* Pet. App. 149, 150, 158, 166.

The district court's decisions also conflict with the opinions of the courts of appeals: *Marsh v. Jones*, 53 F.3d 707 (5th Cir. 1995); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997), *cert. denied*, 552 U.S. 906 (1997); *Hartsfield v. Vidor*, 199 F.3d 305, 306 (6th Cir. 1999) ("an inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted remedies or that it is futile to do so because his grievance is now time-barred by the regulations."); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 536 (7th Cir. 1999); *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000), *reh'g en banc denied*, 2000 U.S. App. Lexis 29604, *cert. denied*, 531 U.S. 1156 (2001).

III. THE DECISIONS BELOW RESOLVE A FEDERAL QUESTION IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENTS.

Review is warranted because the district court flatly refuses to follow this Court's clear decision in *Booth*, and the court of appeals refused to correct this flagrant abuse.

A. THE FOURTH CIRCUIT'S FAILURE TO CORRECT THESE DECISIONS DEPRIVES PRISON OFFICIALS OF CONSTITUTIONAL AND LEGISLATIVE PROTECTIONS.

This Court has consistently held that state officials are entitled to have threshold issues addressed first. For example, dealing with qualified immunity claims first

> permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. In Mitchell v. Forsyth, supra, we said, "Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."

Siegert v. Gilley, 500 U.S. 226, 231-32 (1991) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

The issue is the same here. The district court has ignored the statute, clear guidance from courts of appeals, and, most especially, controlling precedent from this Court. The PLRA provides absolute immunity from suit on unexhausted claims. Yet this immunity has been well and truly lost since the district court refuses to follow the law. The Petitioners have been forced through expensive and time consuming preparation defending the cases on the merits, none of which would have occurred had the district court properly followed the law. Indeed, the district court has so completely reversed the normal course of events that the Petitioners have been required

to defend on the merits Toles' claim under the RLUIPA. This, notwithstanding the fact that the RLUIPA itself is subject to the PLRA's exhaustion requirement, 42 U.S.C. §2000cc-2(e); notwithstanding the fact that the district court has failed to rule on the threshold issue of the constitutional challenge to RLUIPA; and notwithstanding the fact that this district court, the Eastern District, and the court of appeals have already upheld the validity of the VDOC's grooming policy, DOP 864, *DeBlasio v. Johnson*, 128 F.Supp.2d 315 (E.D. Va. 2000), *aff'd*, 2001 U.S. App. Lexis 14328; *Ashann-Ra v. Commonwealth*, 112 F.Supp.2d 559 (W.D. Va. 2000); *see also, Hines v. South Carolina Dept. of Corrections*, 148 F.3d 353 (4th Cir. 1998).

B. THE FOURTH CIRCUIT'S REFUSAL TO HEAR THE APPEALS LEAVES THE PRISON OFFICIALS WITH NO EFFECTIVE REMEDY.

Under the district court's rulings, made binding by the court of appeals' refusal to hear the appeals, inmates are freely invited to file lawsuits without bothering to exhaust grievance remedies. This denies all prison officials in the Fourth Circuit the valuable "immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Unless a court of appeals takes the certified interlocutory appeal of the refusal to dismiss the case for failure to exhaust, prison officials have no choice but to undergo protracted, unnecessary discovery, litigation and trial. Since inmates usually lose the vast majority of their cases, it is most likely that the prison officials will end up as the "prevailing party." And since it is extremely difficult for a prevailing party to convince a court of appeals to hear their appeal of a case

they won, a certified interlocutory appeal would seem to be virtually the only method of securing efficient review of such a ruling. Yet when a court of appeals fails to hear the certified interlocutory appeal, it utterly fails in its duty to oversee the district court and correct the type of plain error demonstrated in this case. Immunity from suit becomes entirely meaningless: in this instance, justice delayed is truly justice denied.

It is unassailable that both the district court and the circuit court have complete discretion in deciding whether to certify the interlocutory appeal and in deciding whether to take the interlocutory appeal. *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976). The major purpose of the certified interlocutory appeal is institutional efficiency and the prevention of unnecessary trials. It is specifically intended to avoid harm to litigants or repeated protracted proceedings. *Lipsett v. University of Puerto Rico*, 740 F.Supp. 921 (D. P.R. 1990).

Here, the district court has made a clear error of law, which is in and of itself an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). Indeed, this court of appeals has recognized that abuse of discretion can occur in a number of ways. "Perhaps its most obvious manifestation is in a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion." *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993). The court of appeals, by refusing to hear the certified interlocutory appeals, failed to properly exercise its discretion and, by its own standard, this is an abuse of discretion.

However, as the Petitioners have demonstrated, they and all prison officials in federal courts in Virginia cannot avoid the harm of the district court's rulings: since the district court has clearly indicated it will not follow either the PLRA or this Court's precedent, they are forced to go through protracted discovery, litigation and trial. Where a district court has so far departed from the accepted and usual course of judicial proceedings by forcing a merits determination rather than dismissing the complaint for failure to exhaust, then it is an abuse of discretion for the circuit court to refuse to entertain the certified interlocutory appeal. Resolution of such important issues should now be resolved via the grant of *certiorari*, rather than a trial or summary judgment motion rendered necessary by the court of appeals' decision not to hear the interlocutory appeal. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

CONCLUSION

The joint petition for writ of *certiorari* should be granted.

Respectfully submitted,

RANDOLPH A. BEALES
Attorney General
Commonwealth of Virginia
PAMELA A. SARGENT*
Senior Assistant Attorney General
**Counsel of Record*
SUSAN F. BARR
Assistant Attorney General

November 13, 2001

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 6, 2001

No. 01-690
CA-00-210-R

DARNELL A. TOLES

Respondent

v.

S. K. YOUNG; A. P. HARVEY; L. T. JANEWAY; CORRECTIONAL OFFICER MIKE MULLINS, a/k/a CORRECTIONAL OFFICER MILLIN; SERGEANT SHORT; GENE M. JOHNSON

Petitioners

ORDER

Petitioner has filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court denies the petition for permission to appeal.

Entered at the direction of Judge Gregory, with the concurrence of Judge Williams and Judge Michael.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 6, 2001

No. 01-670
CA-00-281-7

MICHAEL HANNON

Respondent

v.

RON ANGELONE; STAN YOUNG, Warden; L. T. JANEWAY, Lieutenant; SERGEANT KENDRICK; MAJOR YATES; ADAM HARVEY, Assistant Warden; CAPTAIN TAYLOR; OFFICER WYNN; OFFICER NUNLEY; OFFICER POWERS; ASSISTANT WARDEN PHILLIPS; JEFFREY HEAD, Sergeant; OFFICER COLLINS; LIEUTENANT SNIDER; J. GILLEY; OFFICER SALYERS; OFFICER OLINGER; B. GILLIAM; M. BLEVINS; M. SALYERS, Disciplinary Hearing Officer; B. RODGERS; OFFICER MANN; R. MULLINS

Petitioners

ORDER

Petitioner has filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court denies the petition for permission to appeal.

Entered at the direction of Judge Gregory, with the concurrence of Judge Williams and Judge Michael.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL A. TOLES,

Plaintiff(s),

v.

Mr. S. K. YOUNG, *et al.*,

Defendant(s).

Civil Action
No. 7:00CV00210

By: Hon. Glen E. Conrad
U. S. Magistrate Judge

ORDER

(Filed Mar. 16, 2000)

Plaintiff has filed a civil rights action pursuant to 42 U.S.C. §1983 with jurisdiction vested pursuant to 28 U.S.C. §1343. Inasmuch as the complaint and attachments do not conform to all requirements for prisoner civil rights actions as promulgated under 28 U.S.C. §1915(a), as amended, and 42 U.S.C. §1997e(a), as amended, it is now

ORDERED

as follows:

(1) The complaint shall be conditionally filed pending satisfaction of the requirements set forth herein;

(2) The plaintiff shall be assessed a filing fee of $150.00 pursuant to 28 U.S.C. §1915(b);

(3) Plaintiff's request to proceed *in forma pauperis* is hereby **GRANTED** to the extent that the court shall not require plaintiff to prepay the $150.00 filing fee,

but shall allow plaintiff to pay the fee in installments, pursuant to the requirements of 28 U.S.C. §1915(a)(2). In order to determine the schedule for payment of the filing fee, plaintiff shall submit a certified copy of plaintiffs trust fund account statement for the six month period immediately preceding the filing of the complaint, obtained from the appropriate prison official of each prison at which the prisoner is or was confined. See enclosed account report form. FAILURE OF THE PLAINTIFF TO RETURN THE REQUESTED INFORMATION WITHIN TWENTY (20) DAYS SHALL RESULT IN DISMISSAL OF THIS ACTION WITHOUT PREJUDICE;

(4) Pursuant to 42 U.S.C. §1997e(a), as amended, the court shall not file this case until the plaintiff has exhausted such administrative remedies as are available at the jail, prison, or other correctional facility at which he is confined. Accordingly, plaintiff must (a) execute and submit the enclosed verification form and (b) submit accompanying documentation demonstrating that he has either exhausted his available remedies **as to each of the claims raised in his complaint**, or that such remedies do not exist at his present place of confinement.[1] FAILURE OF THE PLAINTIFF TO RETURN THE REQUESTED INFORMATION WITHIN TWENTY (20) DAYS SHALL RESULT IN DISMISSAL OF PART OR ALL OF THIS ACTION WITHOUT PREJUDICE. If plaintiff has not completed exhaustion, plaintiff may request voluntary dismissal, or wait for automatic dismissal at the

---

[1] The court notes that plaintiff includes copies of several grievances and appeals with his complaint. However, as he does not submit any copies of a Level II response, it is not now clear whether he has exhausted his remedies.

end of twenty (20) days. Plaintiff may then refile his case if exhaustion is not successful.

(5) Plaintiff is advised that his current allegations fail to state a claim against the named defendants. To state a cause of action under §1983, a plaintiff must allege facts indicating that plaintiff has been deprived of rights guaranteed by the Constitution or laws of the United States and that this deprivation resulted from conduct committed by a **person** acting under color of state law. *West v. Atkins*, 487 U.S. 42 (1988). Although plaintiff has named individuals as defendants, he has not alleged what each of these defendants personally did to violate his rights. Plaintiff may amend the complaint within twenty (20) days to allege specific facts concerning the actions undertaken by each defendant in violation of plaintiff's rights. The court cannot construct claims against the defendants based on the appearance of their names in the grievances attached to the complaint. Rather, plaintiff needs to amend the complaint to make a clear statement of his claim(s) against each defendant. Rule 8, Federal Rules of Civil Procedure. **Failure to amend satisfactorily within the time allotted may result in dismissal of the action for failure to state a claim under §1983.**

(6) The plaintiff is referred to Rule 5 of the Federal Rules of Civil Procedure which requires that every pleading after the complaint and every written motion, notice, or other similar paper be served on all parties, which service shall be made by mailing it to the parties' attorney;

(7) Plaintiff is advised that in legislation recently signed into law by the President of the United States, it is provided that a prisoner may not bring a civil action without complete prepayment of the appropriate filing fee if the prisoner has brought on three or more

occasions, an action or appeal in a federal court that was dismissed as frivolous, as malicious, or for failure to state a claim upon which relief may be granted, unless the prisoner is in imminent danger of serious physical injury. *See* 28 U.S.C. §1915(g). Plaintiff is advised that if plaintiff has had prior cases dismissed for any of the above-stated reasons, these prior dismissals may limit plaintiff's ability to file new cases without full prepayment of the $150.00 filing fee. If plaintiff has any other actions currently pending before the Court, plaintiff is advised that if any such case is dismissed for the reasons stated above, it will also be deemed as one of the three dismissals. If plaintiff believes that this case, or any other pending case, may be dismissed as frivolous, as malicious, or for failure to state a claim upon which relief may be granted, plaintiff may file a motion for voluntary dismissal of such case(s) pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

(8) Plaintiff shall notify the Court immediately upon plaintiff's transfer or release and shall provide a new address if known. FAILURE TO NOTIFY THE COURT OF SUCH A CHANGE OF ADDRESS WILL RESULT IN DISMISSAL OF THIS CASE.

(9) Parties are advised that pursuant to Standing Order of Court entered September 19, 1988, all nondispositive orders in this case will be referred to the Hon. Glen E. Conrad, United States Magistrate Judge. (See Appendix);

For reasons stated above, this complaint will be conditionally filed and will be maintained on the active docket to give the plaintiff the opportunity to correct deficiencies noted herein. *The defendant(s) shall be mailed a*

courtesy copy, but no answer will be required until further order of the Court.

The Clerk is directed to send certified copies of this order to the plaintiff and to counsel of record for the defendant(s), if known.

ENTER: This 15th day of March, 2000.

/s/ Glen E. Conrad
UNITED STATES MAGISTRATE JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL TOLES,

Plaintiff(s),

v.

MR. S. K. YOUNG, *et al.*,

Defendant(s).

Civil Action
No. 7:00-CV-00210

By: Hon. Glen E. Conrad
U. S. Magistrate Judge

ORDER

(Filed Apr. 7, 2000)

It appears to the Court that plaintiff has now complied with all of the requirements for filing a prisoner civil rights action pursuant to 42 U.S.C. §1983. Accordingly, it is now

ORDERED

as follows:

(1) Plaintiff is directed to execute the enclosed consent to withholding of fees from his inmate account. FAILURE TO RETURN THE SIGNED CONSENT FORM TO THE COURT WITHIN TWENTY (2O) DAYS OF THE DATE OF ENTRY OF THIS ORDER SHALL RESULT IN DISMISSAL OF THIS ACTION WITHOUT PREJUDICE.

(2) Plaintiff's motion to amend shall be and hereby is **GRANTED** and his complaint is hereby supplemented as stated in the motion to amend.

(3) Once served, the defendants shall file their responsive pleadings within sixty (60) days from the date set forth on the Notice of Lawsuit if the defendants choose to return the Waiver of Service of Summons form within thirty (30) days of that same date. See

gen. Rule 4(d) of the Federal Rules of Civil Procedure. The defendants may choose to waive the filing of a reply pursuant to 42 U.S.C. §1997e(g). Such a waiver shall be made by way of a formal pleading.

(4) If the defendant(s) dispute plaintiff's assertions that he has fully exhausted administrative remedies, defendant(s) may raise this issue by way of a motion to dismiss for failure to exhaust. Such a motion may be made in conjunction with the responsive pleadings required in Paragraph (3), but shall not be made in lieu of such responsive pleadings. Such a motion to dismiss for failure to exhaust must be accompanied by a copy of the grievance plan or procedure which is used for the exhaustion of remedies at the institution in question. In the case of those institutions or facilities whose grievance procedure has been certified pursuant to the Civil Rights of Institutionalized Persons Act, it will not be necessary for the defendant(s) to file a copy of the grievance procedure.

(5) Both sides are advised that pursuant to Standing Order of Court entered May 3, 1996, and Rule 83(b) of the Federal Rules of Civil Procedure, the Court may direct the parties in a prisoner civil rights case to file a motion for summary judgment supported by affidavits.

(6) The plaintiff is hereby granted 20 days from the receipt of a copy of defendants' answer and other responsive pleadings within which to file opposing affidavits or other appropriate material, if he be so advised. Failure to so respond may result in the entry of judgment against the plaintiff on the basis of defendants' responsive pleading;

(7) Parties are referred to Rule 5 of the Federal Rules of Civil Procedure which requires that every pleading

after the complaint and every written motion, notice, or other similar paper be served on all parties, which service shall be made by mailing it to the parties' attorney;

(8) Parties are advised that pursuant to Standing Order of Court entered September 19, 1988, all nondispositive orders in this case will be referred to the Hon. Glen E. Conrad, United States Magistrate Judge. (See Appendix);

(9) Plaintiff shall notify the Court immediately upon his transfer or release and shall provide a new address if known. FAILURE TO NOTIFY THE COURT OF SUCH A CHANGE OF ADDRESS WILL RESULT IN DISMISSAL OF THIS CASE.

The Clerk is directed to sent certified copies of this Order and attachments thereto to all parties.

ENTER: This 7th day of April, 2000.

/s/ Glen E. Conrad
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL A. TOLES,	)	**Civil Action**
Plaintiff,	)	**No. 7:00-cv-00210**
	)	**ORDER**
v.	)	
MR. S. K. YOUNG, *et al.,*	)	**(Filed Oct. 25, 2000)**
	)	**By: Hon. James C. Turk**
Defendant(s).	)	**United States District Judge**

In accordance with the accompanying memorandum opinion, it is hereby **ADJUDGED AND ORDERED** as follows:

(1) Defendants' motion to dismiss and motion for protective order shall be and hereby are **DENIED.**

(2) Defendants are hereby **DIRECTED** to provide the plaintiff with the full name of the Officer Mullins who was working at Wallens Ridge State Prison in C6 on December 15, 1999, in response to plaintiff's discovery request. If this officer is no longer working at Wallens Ridge, defendants are hereby directed to provide his last known address to the court in confidence.

(2) [sic] Plaintiff's Claim 4, alleging denial of religious services, and Claim 5, alleging denial of the opportunity to communicate with other inmates in violation of his right to access the courts, shall be and hereby are **DISMISSED** without prejudice, pursuant to 28 U.S.C. §1915(e)(2), for failure to state a claim.

(3) [sic] Defendants are hereby **DIRECTED** to submit within thirty (30) days from the entry of this order an answer to plaintiff's remaining claims and any motion for summary judgment, supported by affidavits. If the court receives no additional dispositive motions within the time allotted, the court shall set the case for a jury trial.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendant(s).

ENTER: This 24th day of October, 2000.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL A. TOLES, Plaintiff,	)	Civil Action No. 7:00-cv-00210
v.	)	MEMORANDUM OPINIONS (Filed Oct. 25, 2000)
MR. S. K. YOUNG, Defendant(s).	)	By: Hon. James C. Turk United States District Judge

Plaintiff Toles, a Virginia inmate proceeding *pro se*, brings this action under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction vested under 28 U.S.C. § 1343. The defendants have filed a motion to dismiss and a motion for protective order against discovery. Plaintiff has responded to both motions, making the matter ripe for the court's consideration. Upon review of the record, the court denies both motions. However, the court also finds that certain of plaintiffs claims must be dismissed, pursuant to 28 U.S.C. § 1915(e)(2).

In his complaint, Plaintiff Toles raises the following claims against specific officers at Wallens Ridge State Prison (Wallens Ridge):

1. Defendants denied Toles the opportunity to exercise his Hebrew Israelite religious beliefs when he was given only two choices upon arrival at Wallens Ridge: voluntarily allowing his hair and beard to be cut or being strapped down to have them forcibly cut.

2. Defendants treated Toles cruelly during the hair cutting and beard shaving procedures.

3. Defendants refused to stay execution of the grooming policy against Toles while he challenged the legality of the grooming policy.

4. Defendants denied Toles religious services.

5. Defendants denied Toles the opportunity to correspond with other inmates concerning legal actions, depriving him of the right to meaningful access of the court.

Defendants argue that Plaintiff Toles' entire case must be dismissed, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of jurisdiction because Toles failed to comply with 42 U.S.C. § 1997e(a). This provision reads as follows:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Defendants offer evidence that, prior to filing this action, Toles did not pursue each of his claims to the highest possible level of the Virginia Department of Corrections (VDOC) Adult Inmate Grievance Procedure. Toles represented to the court in a verified statement that he had exhausted his grievance remedies as to each claim, whereupon the court filed the action.[1]

---

[1] In his response to defendants' motion, Toles does not withdraw his verified statement, although he also does not offer details about how he exhausted the grievance procedures as to each of his claims.

Upon review of the record, the court concludes that to dismiss the action to require Toles to attempt further exhaustion of his claims under the Adult Inmate Grievance Procedure at this time would be futile. The court takes judicial notice of DOP 866-7.14, which provides:

> Grievances are to be filed within 30 calendar days from the date of occurrence/incident or discovery of the occurrence/incident, except in instances: 1) beyond the inmate's control, or 2) where a more restrictive time frame has been established in Division Procedures to prevent loss of remedy or the issue from becoming moot.

All of the events of which Toles complains occurred more than 30 days ago. Defendants do not offer any evidence demonstrating that Toles' claims fall under either of the exceptions to the 30 day limit under DOP 866-7.14 or that he otherwise has any administrative remedies available to him now regarding the events of which he complains. Accordingly, the court finds that the requirements under § 1997e(a) have been met. The court denies defendants' motion to dismiss for lack of jurisdiction.[2]

Nevertheless, the court finds that Toles' fourth and fifth claims must be dismissed, pursuant to 28 U.S.C. § 1915(e)(2), for failure to allege facts stating a claim. In Claim 4, Toles merely alleges that he had no access to religious services at Wallens Ridge. In Claim 5, he alleges that Wallens Ridge defendants failed to allow him to communicate with other inmates. From the grievances

---

[2] If defendants believe it to be warranted, they may move for other appropriate sanctions against Toles in relation to his representations of his exhaustion efforts.

Toles filed about this claim, he apparently believes that officers' refusal to allow him to bring legal materials out of his cell to share with other inmates during recreation time violated his right to access the courts.

To state a cause of action under § 1983, a plaintiff must establish that he has been deprived of rights guaranteed by the Constitution or laws of the United States and that this deprivation resulted from conduct committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42 (1988). Inmates have a guaranteed right to reasonable access to both state and federal courts and to communication with attorneys. *Ex parte Hull*, 312 U.S. 456 (1941); *Procunier v. Martinez*, 416 U. S. 396 (1974). Where an inmate has had access to court, but alleges facts showing denial of some item or service necessary for meaningful pursuit of his litigation, the inmate must allege facts showing actual injury or specific harm to his litigation efforts resulting from the denial. *Lewis v. Casey*, 518 U.S. 343 (1996). Stated differently, an inmate must come forward with something more than vague and conclusory allegations of inconvenience or delay in his instigation or prosecution of legal actions. He must establish a specific prejudice stemming from the denial of the item which was necessary for proceeding with his litigation. A sincere, but personal religious belief warrants constitutional protection, regardless of whether the belief is mandated by a particular, established religion or held by a majority of the believers within a religion. *Martinelli v. Dugger*, 817 F.2d 1499, 1503 (11th Cir. 1987). The United States Supreme Court has stated the appropriate balancing standard in the prison context: "[W]hen a prison regulation impinges on [an inmate's] constitutional

rights, the regulation is valid if it is reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-49 (1987), *quoting Turner v. Safley*, 482 U.S. 78, 89 (1987).

The court informed Toles that he should amend his claims to indicate specific actions by specific defendants in violation of his rights. The court also informed Toles that he could not rely on statements in grievances to state his claims. Although he did amend to provide more details as to his religious rights claims regarding the grooming policy, Toles failed to amend the complaint regarding specific actions by specific defendants relating to the religious services claim or the access to courts claim. He does not allege specific facts concerning which of the defendants acted to deprive him of these rights, what specific requests he made regarding exercise of these rights, or what specific actions the defendant(s) took in response to his requests. Accordingly, he has failed to allege facts stating a claim against any of the defendants for denial of religious services or access to courts. *West, supra*. Moreover, he fails to allege specific harm to his litigation resulting from the denial of corresponding with other inmates. *Casey, supra*. He also fails to allege that his sincere religious belief requires him to attend religious services, *Dugger, supra*, or that defendants' failure to provide such services is not reasonably related to legitimate prison interests such as security, *O'lone, supra*. Accordingly, the court dismisses Claims 4 and 5 without prejudice, pursuant to § 1915(e)(2), for failure to state a claim. However, Toles' claims 1 through 3, concerning implementation of the VDOC grooming

policy against him, shall go forward. An appropriate order shall be issued this day.

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to plaintiff and to counsel of record for the defendant(s).

ENTER: This 24th day of October, 2000.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL A. TOLES,	)	
Plaintiff,	)	**Civil Action No. 7:00-cv-00210**
v.	)	**ORDER**
MR. S. K. YOUNG, *et al.*,	)	**(Filed Feb. 14, 2001)**
Defendant(s).	)	**By: Hon. James C. Turk United States District Judge**

In accordance with the accompanying memorandum opinion, it is hereby **ADJUDGED AND ORDERED** as follows:

(1) Defendants' motion to dismiss on the ground that the court has no subject matter jurisdiction because plaintiff failed to exhaust administrative remedies as to all of his claims shall be and hereby is **DENIED**.

(2) Defendants' motion to dismiss on the ground that RLUIPA is unconstitutional shall be and hereby is **TAKEN UNDER ADVISEMENT**, pending issuance of a Rule 24 notice to the United States Attorney General. The parties and the United States are hereby notified that the court will delay ruling upon the constitutionality of RLUIPA for thirty (30) days from the date of the Rule 24 notice in order to give the United States an opportunity to inform the court as to whether the United States intends to intervene in this action.

(3) As the issues have been joined on plaintiff's claims under 42 U.S.C. §1983, and as the time allotted by the court for submission of any motion for summary

judgment as expired, this matter shall be set for trial on plaintiff's §1983 claims before a seven-member jury in the United States Courthouse in Big Stone Gap, Virginia.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendant(s).

ENTER: This 14th day of February, 2001.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL A. TOLES,	)	**Civil Action**
Plaintiff,	)	**No. 7:00-cv-00210**
	)	**MEMORANDUM**
v.	)	**OPINION**
	)	
MR. S. K. YOUNG,	)	**(Filed Feb. 14, 2001)**
Defendant(s).	)	**By: Hon. James C. Turk**
	)	**United States District**
	)	**Judge**
	)	

Plaintiff Toles, a Virginia inmate proceeding *pro se*, brings this action under the Civil Rights Act, 42 U.S.C. §1983, with jurisdiction vested under 28 U.S.C. §1343, and under 42 U.S.C. §2000cc, *et. seq.*, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The defendants[1] have filed a motion to dismiss, to which plaintiff has responded, making the matter ripe for the court's consideration. Upon review of the record, the court denies the motion to dismiss in part and takes it under advisement in part.

Plaintiff Toles brings the following claims against specific officers at Wallens Ridge State Prison (Wallens Ridge), where he was incarcerated until recently:

---

[1] The defendants bringing this motion are the only defendants who were fully identified in the complaint and served process in this action: Warden S. K. Young. Assistant Warden A. O. Harvey, Capt. C. Janeway, Sgt. M. Short, and Gene M. Johnson.

1. Defendants denied Toles the opportunity to exercise his Hebrew Israelite religious beliefs when he was given only two choices upon arrival at Wallens Ridge: voluntarily allowing his hair and beard to be cut or being strapped down to have them forcibly cut.

2. Defendants treated Toles cruelly during the hair cutting and beard shaving procedures.

3. Defendants refused to stay execution of the grooming policy against Toles while he challenged the legality of the grooming policy.

4. Defendants denied Toles religious services.

5. Defendants denied Toles the opportunity to correspond with other inmates concerning legal actions, depriving him of the right to meaningful access of the court.

By opinion and order entered October 25, 2000, the court denied defendants' first motion to dismiss on grounds that Toles had not exhausted his administrative remedies as required under 42 U.S.C. §1997e(a).[2] In that order, the court also dismissed Claims 4 and 5 for failure to state a claim, pursuant to 28 U.S.C. §1915(e)(2), and set a deadline for defendants to file any motion for summary judgment. On November 28, 2000, the defendants filed an answer to Claims 1 through 3, which the court later

---

[2] Section 1997e(a) reads:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

deemed timely filed. The next day Toles filed a motion to amend to bring his claim concerning restrictions on his religious beliefs under RLUIPA as well as §1983. By order entered December 13, 2000, the court granted the motion to amend and directed defendants to file a motion for summary judgment within thirty days as to the amended complaint. On January 12, 2001, the defendants filed a motion to dismiss the entire action for lack of subject matter jurisdiction. Specifically, they argue that Toles' failure to exhaust his administrative remedies under the Virginia Department of Corrections (VDOC) grievance procedures as to the RLUIPA claim before filing his motion to amend deprives the court of subject matter jurisdiction over this claim. They also incorporate the argument in their previous motion to dismiss that Toles failed to comply with §1997e(a) as to the §1983 claims in his original complaint deprives the court of subject matter jurisdiction over those claims. Defendants rely on *Rose v. Lundy*, 455 U.S. 509 (1982) (requiring district court to dismiss state inmate's habeas corpus petition without prejudice if petitioner has not presented all claims to highest state court). Finally, defendants challenge the constitutionality of RLUIPA itself as applied to state prisons.

Upon review of the record, the court finds no merit to defendants' arguments under §1997e(a). First, this court has held that an inmate's failure to exhaust administrative remedies under §1997e(a) does not deprive the district court of subject matter jurisdiction over his civil action. *See Johnson v. True*, 125 F. Supp.2d 186, 188 (W.D. Va. 2000). Second, this court has also rejected defendants' *Rose v. Lundy* argument that § 1997e(a) requires dismissal

of the entire civil action if it includes unexhausted claims. *See id* [sic] at 188-89 (rejecting *Rose v. Lundy* argument where inmate had exhausted administrative remedies as to some claims, but not as to other claims in §1983 action and inmate was precluded under VDOC grievance procedures from further exhaustion of claims based on passage of time).

Finally, defendants offer absolutely no evidence that Toles has any administrative remedies available to him at this time as to any of his claims, including his RLUIPA claim. The court takes judicial notice of the fact that VDOC procedures require rejection of an inmate's regular grievance if it is not filed within thirty (30) days from the date of the occurrence of which he is complaining, except under circumstances not present here. *See DOP* 866.-714. The events of which Toles complains occurred beginning in December 1999, and RLUIPA was enacted in September 2000. Clearly, the time limit for Toles to file regular grievances as to the 1999 events, under §1983 or RLUIPA, has expired. The court cannot find that §1997e(a) requires the court to dismiss an action to require the inmate to pursue grievance remedies that he and the court know are no longer available to him.[3] As the defendants have presented no evidence that Toles has any administrative remedy now available to him as to his claims under § 1983 and RLUIPA, the court finds that the requirements of §1997e(a) are met. *Johnson*, 125 F. Supp.2d at 189. *See*

---

[3] It is also not clear from the grievance procedures themselves whether Toles would be able to continue utilizing the VDOC grievance procedures at all now that he is no longer incarcerated in Virginia.

also Langford v. Couch, 50 F. Supp.2d 544, 550 (E.D. Va. 1999) (holding open question whether inmate civil action could be dismissed for lack of exhaustion if inmate would now be precluded by passage of time from utilizing prison grievance procedures). In accordance with the foregoing, the court denies the motion to dismiss the action for lack of subject matter jurisdiction based on Toles' failure to exhaust his administrative remedies. As to defendants' argument that RLUIPA is unconstitutional, the court takes the motion to dismiss under advisement, pending issuance of a Rule 24 notice to the United States Attorney General. See Rule 24, Federal Rules of Civil Procedure. An appropriate order shall be issued this day.

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to plaintiff and to counsel of record for the defendant(s).

ENTER: This 14th day of February, 2001.

/s/ James C. Turk.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DARNELL A. TOLES, Plaintiff, v. MR. S. K. YOUNG, *et al.*, Defendant(s).	) Civil Action No. 7:00-cv-00210) **ORDER**) (Filed March 22, 2001)) By: Hon. James C. Turk United States District Judge

By memorandum opinion and order entered February 14, 2001, the court denied defendants' renewed motion to dismiss plaintiff's claims based on his failure to exhaust his administrative remedies before filing this lawsuit, pursuant to 42 U.S.C. § 1997e(a). On March 7, 2001, defendants moved the court for certification of this issue for interlocutory appeal to the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1292(b). Defendants also moved for a stay of the action, pending completion of the interlocutory appeal. Although the court must deny defendants' motion for certification, the court upon its own motion will amend the February 14, 2001, memorandum opinion and order to reflect the court's recognition that the § 1997e(a) issues may warrant an interlocutory appeal.

The court's February 14, 2001, order did not indicate that any issue addressed in the order or the accompanying memorandum opinion met the qualifications for interlocutory appeal, pursuant to § 1292(b). Defendants ask that the court now issue an order "certifying the issues for appeal pursuant to 28 U.S.C. § 1292(b)." The

court finds no provision in § 1292(b) authorizing this court to enter an order certifying an issue in a previous judgment for interlocutory appeal. Pursuant to Rule 5, Federal Rules of Appellate Procedure, defendants could have moved for amendment of the February 14, 2001 order to include the court's recognition that an issue warranted interlocutory appeal, pursuant to § 1292(b). However, a motion to amend judgment must be filed within ten days from entry of the judgment, pursuant to Rule 59(e), Federal Rules of Civil Procedure. Defendants' motion for certification, even if construed as a motion to amend judgment, was filed outside that ten-day time limit. Accordingly, the court must deny defendants' motion. However, as defendants note in their motion, the Honorable Jackson L. Kiser, in another civil action filed by a Virginia inmate, has recently recognized that the § 1997e(a) issues meet the requirements under § 1292(b) for an interlocutory appeal. Defendants also point out that other courts, including circuit courts of appeals, have ruled differently on the issue than did the court in the February 14, 2001 judgment. Moreover, if defendants' arguments succeed on appeal, they would be dispositive of Toles' entire action, precluding the necessity of addressing a challenge to the constitutionality of a federal statute and eliminating the need to conduct a jury trial. Accordingly, the court, on its own motion, will amend the February 14, 2001, memorandum opinion and order to recognize that the § 1997e(a) issues meet the requirements under § 1292(b) for an interlocutory appeal. However, the court must deny defendants' motion for stay as premature. Defendants may renew the motion for stay in

the event that the Court of Appeals, exercising its discretion under § 1292(b), actually grants an interlocutory appeal in this case.

In accordance with the foregoing, it is hereby **ORDERED** as follows:

(1) Defendants' motion for certification of issues for interlocutory appeal and motion for stay pending appeal shall be and hereby are **DENIED**.

(2) On the court's own motion, Footnote 3 in the memorandum opinion entered on February 14, 2001, shall be and hereby is **AMENDED** to read as follows:

> Defendants argue that Toles' action should now be dismissed with prejudice because he failed to exhaust his administrative remedies before filing his lawsuit and because 30 day time period allotted under the VDOC grievance procedure for him to file an initial grievance, or the even shorter period to appeal a regular grievance to a higher level of administrative review, has expired. Like the defendants, the court is concerned that under the VDOC's current grievance system, inmates might purposefully circumvent § 1997e(a) by sitting on their rights until the opportunity to pursue administrative remedies expires and then arguing that they may bring a federal civil action because no administrative remedies are available. The court agrees that if remedies are still available to the inmate under the grievance procedure, his civil action should be dismissed without prejudice

and he should be required to exhaust available remedies before refiling his lawsuit. However, the court cannot interpret § 1997e(a) to allow the VDOC grievance-filing deadlines to serve as *de facto* statutes of limitations, potentially extinguishing an inmate's federal cause of action to vindicate federal rights in as little as 30 days after those rights accrue. *See Owens v. Okure*, 488 U.S 235, 239-40 (1989) (holding that because "§ 1983 claims are best characterized as personal injury actions," a state's "general or residual" statute of limitations for personal injury actions should be applied to *all* § 1983 claims), *quoting Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (emphasis added); Virginia Code § 8.01-243(A)(setting two year statute of limitations for personal injury actions). Accordingly, the court must reject defendants' argument that dismissal of a civil action for failure to comply with § 1997e(a) should be with prejudice.

(3) On the court's own motion, the order entered February 14. 2001, addressing defendants' motion to dismiss, shall be and hereby is **AMENDED** to include a Paragraph (4) which shall read as follows:

(4) The court finds that the issues addressed in this order and accompanying memorandum opinion regarding plaintiff's compliance with 42 U.S.C. § 1997e(a) involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order to the United States Court of

Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1292(b), may materially advance the ultimate termination of the litigation.

The Clerk is directed to send certified copies of this order to plaintiff and to counsel of record for the defendant(s).

ENTER: This 21st day of March, 2001.

/s/ James C. Turk
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 21, 2001

No. 01-690
CA-00-210-R

DARNELL A. TOLES

Respondent

v.

S. K. YOUNG; A. P. HARVEY; L. T. JANEWAY; CORRECTIONAL OFFICER MIKE MULLINS, a/k/a CORRECTIONAL OFFICER MILLIN; SERGEANT SHORT; GENE M. JOHNSON

Petitioners

On Petition for Rehearing and Rehearing En Banc

The petitioners' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Gregory for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL HANNON,	) **Civil Action No.**
Plaintiff,	) **7:00cv00281**
	)
v.	) **ORDER**
	)
RON ANGELONE, et al.,	) **(Filed June 27, 2000)**
	)
Defendant(s).	) **By: Hon. Glen E. Conrad**
	) **United States**
	) **Magistrate Judge**

Hannon moves for waiver of the civil filing fee in this action; for permission to bypass the requirement under 42 U.S.C. § 1997e that inmates exhaust administrative remedies; and for appointment of counsel at court expense. The motions must be denied.

First, Hannon requests that the court waive the $150.00 filing fee because he has no income. As he is a prisoner filing a civil action, the court cannot waive the fee. See 28 U.S.C. § 1915(b)(1). In the alternative to his request for waiver of the fee, Hannon has also consented to pay the fee through installments withdrawn from his inmate account as money becomes available.

Second, Hannon alleges that he should not be required to exhaust administrative remedies any further because prison officials delay response to requests and grievances in a deliberate attempt to hamper his litigation efforts. He also alleges that officers answering different levels of the appeal process work together, making the appeals meaningless. On May 2, 2000, Hannon submitted a verified statement indicating that he had exhausted his

administrative remedies and requested additional time, which the court granted, merely to submit paperwork documenting exhaustion. If this verified statement is inaccurate, then Hannon needs to withdraw it, or he could be subject to perjury charges. In the alternative, he may withdraw claims for which he has not exhausted administrative remedies or explain as to each claim the attempts he has made to exhaust his remedies. Based on Hannon's allegations, the court will waive the requirement that he submit complete *documentation* of exhaustion. Also, the court may later dismiss claims if the defendants disprove his assertions about exhaustion.

In accordance with the foregoing, it is hereby

ORDERED

that Hannon's motions for waiver of the filing fee and for waiver of the requirement to exhaust administrative remedies shall be and hereby are **DENIED**; that the court hereby accepts Hannon's verified statement that he has exhausted his remedies and will not require submission of additional documentation; and that based upon the verified statement and Hannon's executed consent to payment of the filing fee, the clerk is hereby **DIRECTED** to attempt service of process in the usual manner upon the defendants.

The Clerk is directed to send certified copies of this order to plaintiff and to counsel of record for the defendant(s).

ENTER: This 26 day of June, 2000.

/s/ Glen E. Conrad
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL HANNON,	)
Plaintiff,	) **Civil Action No.**
	) **7:00-cv-00281**
v.	)
	) **ORDER**
RON ANGELONE, et al,	)
	) **(Filed Dec. 15, 2000)**
Defendants.	)
	) **By: Hon. Jackson L. Kiser**
	) **Senior U.S. District Judge**

In accordance with the accompanying memorandum opinion, it is hereby **ADJUDGED** and **ORDERED** as follows:

(1) Defendant's[1] motion to dismiss shall be and hereby is **DENIED**;

(2) The non-medical defendants[2] are hereby **DIRECTED** to submit within thirty (30) days from the date of entry of this order an answer to plaintiff's claims and any motion for summary judgment, supported by affidavits. If the court receives no additional dispositive motions from the non-medical defendants within the time allotted, the court shall set the case for a jury trial as to such defendants;

---

[1] Ron Angelone, Stan Young, L. T. Janeway, Sgt. Kendrick, Major Yates, Adam Harvey, Captain Taylor, Officer Wynn, Officer Nunley, Officer Powers, Asst. Warden Phillips, Jeffrey Head, Officer Collins, Officer Snider, J. Gilley, Officer Salyers, Officer Olinger B. Gilliam, M. Blevins, M. Salyers, B. Rodgers, Officer Mann, and R. Mullins.

[2] *Id.*

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendant(s).

ENTER: This 15th day of December, 2000.

/s/ Jackson L. Kiser
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL HANNON,	) **Civil Action**
Plaintiff,	) **No. 7:00-cv-00281**
	) **MEMORANDUM**
v.	) **OPINION**
RON ANGELONE, *et al*,	) **(Filed Dec. 15, 2000)**
Defendants.	) **By: Hon. Jackson L. Kiser**
	) **Senior U.S. District Judge**

Plaintiff Michael Hannon, a Virginia inmate proceeding *pro se*, brings this action under the Civil Rights Act, 42 U.S.C. §1983, with jurisdiction vested under 28 U.S.C. §1343. In his complaint, plaintiff alleges that, while incarcerated at Wallens Ridge State Prison (WRSP), his rights guaranteed by the First, Second, Sixth, and Eighth Amendments to the United States Constitution were violated in that he was denied medical treatment, denied access to adequate legal materials, forced to consume his meals in a short amount of time, denied free exercise of his religion, repeatedly exposed to toxic chemicals, denied privacy from female officers while showering, and retaliated against for filing lawsuits and grievances related thereto. Plaintiff names various officials within the Virginia Department of Corrections (VDOC) and at WRSP as defendants. He seeks injunctive and monetary relief.

The defendants.[1] through counsel, have filed a motion to dismiss. By order dated October 11, 2000 the court notified the plaintiff of the defendant's motion to dismiss as required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and warned plaintiff that judgment might be granted for the defendants if plaintiff did not respond to the motion. Plaintiff has now responded, thus the matter is ripe for the court's consideration. Upon review of the record, I must deny the motion to dismiss by the defendants.

Defendants have moved to dismiss Hannon's complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that this court lacks subject matter jurisdiction over his §1983 claims because he has not exhausted his administrative remedies in accordance with 42 U.S.C. §1997e(a) as to "each and every element of each and every claim." Section 1997e(a) of the Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are

---

[1] There are at least two different sets of defendants; the medical defendant (Nurse Kelly), and the non-medical institutional defendants (Ron Angelone, Stan Young, L.T. Janeway, Sgt. Kendrick, Major Yates, Adam Harvey, Captain Taylor, Officer Wynn, Officer Nunley. Officer Powers, Asst. Warden Phillips, Jeffrey Head, Officer Collins, Officer Snider, J. Gilley, Officer Salvers, Officer Olinger, B. Gilliam, M. Blevins, M Salyers, B. Rodgers, Officer Mann, and R. Mullins). Only the non-medical defendants have filed a motion to dismiss and unless otherwise stated, the term "defendants" used herein will refer only to that set of defendants.

exhausted." 42 U.S.C. §1997e(a). At the outset, it is noted that §1997e(a) has not been found by the courts of this circuit to impose exhaustion of administrative remedies as a prerequisite to jurisdiction. Thus, the fact that there are claims within the complaint that may not have been exhausted does not deprive this court of subject matter jurisdiction to rule on such claims. *See, e.g., Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) (in contrast to statutes that require exhaustion of administrative remedies as a prerequisite to jurisdiction "§ 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. § 1331"). Moreover, the fact that this court routinely reviews cases falling within the ambit of the PLRA, prior to any determination by the court regarding a plaintiff's full exhaustion of a particular claim, should indicate to the defendants that the court does not believe § 1997e(a) acts as a prerequisite to its subject matter jurisdiction.[2] Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be denied.

To the extent that the defendants are challenging; the court's jurisdiction over this matter on the basis that the complaint contains both exhausted and unexhausted claims, the motion to dismiss must also be denied. The defendants admit that, as to certain of his claims, Harmon has fully exhausted all available administrative remedies.

---

[2] For example. this court frequently dismisses *sua sponte*, complaints on the basis that they fail to state a claim upon which relief may be granted or that the, are malicious or frivolous, consistent with the PLRA. without first making an initial determination on jurisdiction based on exhaustion.

However, there are other claims within Hannon's complaint that have not been fully exhausted through the VDOC grievance procedure. The defendants contend that because Hannon's complaint contains both exhausted and unexhausted claims, the court has no jurisdiction over this action and, thus, it should be dismissed.

Defendants appear to have relied on *habeas corpus* jurisprudence for their proposition that claims containing both exhausted and unexhausted components must be dismissed in their entirety. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, there is "[n]othing in the language or legislative history of the PLRA's amendments to section 1997e(a) [that] supports a 'total' exhaustion requirement." *Cooper v. Garcia*, 55 F.Supp.2d 1090, 1094 (S.D.C.A. 1999). Furthermore, I find that the defendants do not provide a viable reason why the *habeas* total exhaustion analysis of *Rose v. Lundy* should be applied to a §1983 civil rights action. In fact, "imposing a total exhaustion requirement would appear to contradict Congress' intent in enacting the PLRA," which was to "discourage 'frivolous and abusive prison lawsuits' . . . [A]s a purely practical matter, if the Court were to construe section 1997e(a) as imposing a total exhaustion requirement and dismiss [an] entire action, the prisoner would merely need to file a new suit alleging only his exhausted claims." *Id.* at 1094-95, *see also Jenkins v. Toombs*, 32 F.Supp.2d 955, 959 (W.D.Mich. 1999) (distinguishing §1983 cases from habeas cases and refusing to apply *Rose v. Lundy*'s "mixed" petition rules to § 1997e(a)). Because I have found that the court possesses proper jurisdiction over this matter and have concluded that jurisdiction is not defeated by the fact that certain of the plaintiff's

claims have not been fully exhausted, the motion to dismiss this action for lack of jurisdiction must be denied.

As to any of Hannon's claims which the defendants argue have not been fully exhausted within the meaning of §1997e(a), Hannon represented to the court in a verified statement that he had in fact exhausted all administrative remedies as to each claim. He alleges that, to the extent some of his claims were not fully prosecuted through the various levels of the grievance procedure, his efforts to so exhaust his administrative remedies were frustrated by prison officials. Hannon claims that the officials at WRSP did "everything in their power to keep him from succeeding at exhaustion," including not filing or not responding to his grievances or otherwise refusing to facilitate the progression of his grievances. In that regard, the defendants admit that on February 7, 2000, Hannon was limited to filing one regular grievance per week for the period from February 9, 2000 to March 9, 2000 and notified that any additional filings would be returned to him. Section §I997e(a) requires that "such administrative remedies as are available [must be] exhausted." The requirement of availability has been construed by the courts of this circuit to mean "accessible," "within one's reach," "at one's disposal." See *Langford v. Couch*, 50 F.Supp.2d 544, 547 (E.D.Va. 1999). Inasmuch as the allegations of the plaintiff and the defendants create a genuine issue of material fact as to whether Hannon exhausted his "available" remedies as to all of his claims, I must deny the motion to dismiss, even as to those aspects of the complaint which have not been fully exhausted within the VDOC grievance procedure.

Even if I were to find that the plaintiff had adequate access to the grievance procedure, inasmuch as Hannon is no longer incarcerated at WRSP and all of his claims concern actions occurring more than thirty (30) days ago, dismissal would be inappropriate in that any attempt by Hannon to further exhaust such claims under the Adult Inmate Grievance Procedure would be futile. The defendants acknowledge as much by specifically directing the court's attention to Departmental Operating Procedure 866 (DOP 866). Defendants cite to DOP 866 for the proposition that "grievances are to be filed within thirty (30) calendar days from the date of [an] occurrence or incident." All of the events of which Hannon complains occurred more than thirty (30) days ago. Defendants do not offer any evidence demonstrating that Hannon's claims fall under any exception to the thirty (30) day limit or that he otherwise has any administrative remedies available to him now regarding the events of which he complains. In fact, the defendants plainly admit that the time limit in which Hannon had to file a regular grievance on these issues has expired. Accordingly, I find that the requirements under §1997e(a) have been met in that Hannon has no remaining available remedies to exhaust. Thus, the motion to dismiss is denied.

For the foregoing reasons, the defendant's motion to dismiss is denied. Pursuant to the Standing Order of Court entered May 3, 1996, and Rule 83(b) of the Federal Rules of Civil Procedure, the non-medical defendants[3] are

---

[3] Ron Angelone, Stan Young, L.T. Janeway, Sgt. Kendrick, Major Yates, Adam Harvey, Captain Taylor, Officer Wynn, Officer Nunley. Officer Powers, Asst. Warden Phillips, Jeffrey

directed to file a motion for summary judgment with supporting affidavits.

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to plaintiff and to counsel of record for the defendants.

ENTER: This 15th Day of December, 2000.

/s/ Jackson L. Kiser
Senior U.S. District Judge

Head, Officer Collins, Officer Snider, J. Gilley, Officer Salvers, Officer Olinger, B. Gilliam, M. Blevins, M Salyers, B. Rodgers, Officer Mann, and R. Mullins.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL HANNON,	) **Civil Action**
Plaintiff,	) **No. 7:00-CV-00281**
	)
v.	) **ORDER**
	)
RON ANGELONE, *et al.*,	) **(Filed Feb. 28, 2001)**
	)
Defendants	) **By: Jackson L. Kiser**
	) **Senior U.S. District Judge**
	)

This action is before the court upon defendants'[1] motions for certification of issues for interlocutory appeal with regard to the court's December 15, 2000 order, and motions for stay pending appeal. I find that, pursuant to 28 U.S.C. § 1292(b), the December 15, 2000 order involves controlling questions of law such that an immediate appeal of that order may materially advance the ultimate termination of this litigation and is therefore appropriate. Accordingly, it is hereby.

---

[1] Both the non-medical defendants (Ron Angelone, Stan Young, L T Janeway, Sgt. Kendrick, Major Yates, Adam Harvey, Captain Taylor, Officer Wynn, Officer Nunley, Officer Powers, Asst. Warden Phillips, Jeffrey Head, Officer Collins, Officer Snider, J. Gilley, Officer Salyers, Officer Olinger, B. Gilliam, M. Blevins, M. Salyers, B. Rodgers, Officer Mann, and R. Mullins) and the medical defendants (Angela Kelly, Gracie Ballard and Correctional Medical Services, Inc.) have filed motions for certification and to stay.

ORDERED

that the defendants' motions for certification of issues for interlocutory appeal and defendants' motion for stay pending resolution of such appeal are **GRANTED**. As such, further action in this case shall be and hereby is **STAYED** pending resolution of the interlocutory appeal.

The Clerk of the Court is directed to send certified copies of this Order to the plaintiff and to counsel of record for the defendants.

ENTER This 28th day of February, 2001

/s/ Jackson L. Kiser
Senior U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 14, 2001

No. 01-670
CA-00-281-7

MICHAEL HANNON

Respondent

v.

RON ANGELONE; STAN YOUNG, Warden; L. T. JANEWAY, Lieutenant; SERGEANT KENDRICK; MAJOR YATES; ADAM HARVEY, Assistant Warden; CAPTAIN TAYLOR; OFFICER WYNN; OFFICER NUNLEY; OFFICER POWERS; ASSISTANT WARDEN PHILLIPS; JEFFREY HEAD, Sergeant; OFFICER COLLINS; LIEUTENANT SNIDER; J. GILLEY; OFFICER SALYERS; OFFICER OLINGER; B. GILLIAM; M. BLEVINS; M. SALYERS, Disciplinary Hearing Officer; B. RODGERS; OFFICER MANN; R. MULLINS

Petitioners

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

Department of Corrections	Procedure Number:
Division of Operations	DOP 866
Subject: Inmate Grievance Procedure	Date: November 20, 1998
	Page 1 of 14

PART I

GENERAL PROVISIONS

866-1.0 *PURPOSE*

To provide an administrative process for fair, prompt decisions and actions in response to inmate grievances.

866-2.0 *AUTHORITY*

Code of Virginia, Section 53.1-10, Powers and duties of Director

866-3.0 *EFFECTIVE DATE*

February 1, 1999

866-4.0 *DISCUSSION*

The inmate grievance procedure is a mechanism for inmates to resolve complaints, appeal administrative decisions, and challenge the substance of procedures. The process provides corrections' administrators a means to assess potential problem areas and, if necessary, correct those areas in a timely manner.

Federal and state laws require inmates to exhaust available administrative processes prior to filing lawsuits concerning conditions of incarceration. To comply with these laws, exhaustion of the regular grievance procedure is mandatory prior to judicial action by the inmate. The only exception is for disciplinary

decisions for which the exhaustion of the inmate disciplinary appeals process is mandatory prior to any judicial action. The filing of an emergency grievance does not satisfy the exhaustion requirement.

866-5.0 *APPLICABILITY*

This Operating Procedure applies to all employees of the Department of Corrections and all inmates incarcerated within a state correctional institution of the Department.

A separate Institutional Operating Procedure is not required. However, the Warden/Superintendent will prepare an implementation memorandum, *which* will provide institution-specific information designating staff responsibilities and institutional processes under this procedure. This Division Operating Procedure and the facility's implementation memorandum will be made available for staff and inmate review.

866-6.0 *DEFINITIONS*

Abuse – the use of these procedures in a manner other than in good faith for resolution of grievances.

Appeal – the submission of a response to a grievance from one level to the next available level for review and response.

Calendar day – any 24-hour day regardless of weekends or state holidays.

Day – a 24-hour period.

Emergency – a situation or condition which may subject the inmate to immediate risk of serious personal injury or irreparable harm.

Founded – when a determination has been made that a remedy is required.

Grievance – an unresolved issue filed and signed by an individual inmate on his/her own behalf concerning an issue which has affected him/her personally.

Grievance Coordinator – the employee designated for coordination and monitoring of the institution's inmate grievance procedure, at institutions that do not have an established Human Rights Advocate position.

Informal Procedure – those processes, practices, or procedures available to inmates to secure institutional services or resolve complaints.

Institutional Ombudsman – the working title of the Human Rights Advocate position designated for the coordination and monitoring of the institution's grievance procedure.

Misuse – using the grievance procedure other than in accordance with the procedures defined herein.

Petitions – complaints submitted or signed by more than one inmate.

Regional Ombudsman – the working title for the Human Rights Advocate Senior employed y the Office of Ombudsman Services responsible for monitoring institutional grievance procedures, and providing investigative services for inmate grievances.

Repetitive Grievance – an issue that has been previously grieved through the regular grievance procedure.

Reprisal – any action or threat of action against anyone for good faith use of or good faith participation in the grievance procedure.

Remedies – actions taken as result of founded grievances.

Request – an attempt to secure a service, privilege, information, or an item from appropriate staff.

Threatening Language – language written within a grievance expressing the intent to physically injure or kill another person.

Unfounded – when a determination is made of compliance with properly established procedures.

Vulgar, Insolent Language – the use of language that is offensive to a reasonable person.

Working day – weekdays, Monday through Friday, except official state holidays.

PART II

PROCEDURES

866-7.0 *INSTITUTIONAL COMPLIANCE WITH THIS DIVISION OPERATING PROCEDURE.*

Each correctional institution will develop an Institutional Implementation Memorandum for inmate grievances that conforms to this procedure. The Implementation Memorandum should be developed with input from the Institutional Ombudsman/Grievance Coordinator and the Regional Ombudsman. Upon review and signature by the Warden or Superintendent, the memorandum will be forwarded to

the Regional Director. The Regional Director will obtain a review by Regional Ombudsman prior to signature and return of the memorandum to the institution.

866-7.1 *PROVISION FOR INSTITUTIONAL OMBUDSMAN/GRIEVANCE COORDINATOR.*

Each institution will have an Institutional Ombudsman/Grievance Coordinator and a designated alternate to ensure procedural compliance in the absence of the Institutional Ombudsman/Grievance Coordinator.

The Institutional Ombudsman/Grievance Coordinator and designated alternate should complete any training requirements set by the Deputy Director of the Division of Operations.

The Institutional Ombudsman/Grievance Coordinator will be responsible for monitoring for compliance, coordination of the day-to-day operation, conducting investigations of grievances and preparing proposed responses as needed.

The Institutional Ombudsman/Coordinator will arrange a method of communication with other institutional departments (e.g., Personal Property, Mailroom) so that information about pending grievances can be shared, prior to making final disposition.

866-7.2 *COMMUNICATION OF PROCEDURES.* All employees and inmates of the Division of Operations should be advised of the Inmate Grievance Procedure. Division Operating Procedure 866 and the facility's implementation memorandum should be available for review in locations accessible to both employees and inmates.

1. Initial Notification at Reception Centers/ Parole Violator Units.

   The standardized initial Inmate Grievance Procedure Notification Form (Attachment 1) should be given to each inmate during orientation at all reception centers and all parole violator units. Inmates with special needs (i.e. visually/hearing impaired, non-English speaking, non-readers) should be identified and the Institutional Ombudsman/Grievance Coordinator notified of the special need so that necessary services can be obtained prior to the center/unit's formal orientation process.

   If an inmate wishes to file a grievance prior to participation in the formal orientation, provisions should be made for staff to provide assistance so that the inmate's ability to grieve an issue is in no way hindered.

2. Institutional Orientation. An explanation of the facility's inmate grievance procedure should be provided to all new employees and incoming inmates during orientation. Provisions should be made prior to orientation for those inmates not speaking English, as well as for the impaired, handicapped and non-readers.

   The Institutional Ombudsman/Grievance Coordinator will monitor to ensure that appropriate information on the inmate grievance procedure is provided.

866-7.3 *ACCESSIBILITY*. Each inmate will be entitled to use the grievance procedure. In cases where an inmate is adjudged by the Warden/Superintendent as abusing that usage, his filings may

be limited by the Warden/Superintendent in accordance with Section 866-7.9.

In the event of a widespread institutional disruption, natural disaster or other unusual occurrence which requires emergency action, any or all portions of this operating Procedure may be temporarily suspended. Once order has been restored, the processing of grievances will resume. The determination as to whether or not emergency conditions exist will be made by the Warden/Superintendent in accordance with procedures governing institutional emergencies.

866-7.4. *REPRISALS.* No reprisals will be visited upon inmates for filing grievances in good faith. Neither employees nor inmates participating in the resolution of grievances should be subject to reprisal in any form. An inmate may pursue a complaint of reprisal through the Inmate Grievance Procedure. Allegations by employees of retaliation should be reported through their chain-of-command.

866-7.5 *WRITTEN RESPONSES WITH REASONS.* At each level of the procedure responses to each grievance will be made in writing, with reasons for the decisions stated clearly. Employees who are the subject of the issue being grieved will not be the respondent, but may offer information during the investigation of the complaint.

866-7.6 *APPEALS.* Appeals will be allowed without interference by administrators or employees of the institution. An inmate who is dissatisfied with the response to a grievance may appeal by signing, dating, and indicating in the designated area reasons why he/she is dissatisfied with the prior response. Appeals not submitted

in accordance with procedures should be returned to the inmate with specific reasons for the return, and if applicable, instructions for resubmittal.

866-7.7 *TIME LIMITS.* Prompt and reasonable time limits will be set, for all levels of the procedure with provisions for emergencies.

866-7.8 *DISCIPLINARY ACTION.* An inmate's use of the grievance procedure should not ordinarily be cause to take disciplinary measures. Inmates are instructed to use the grievance process in good faith for problem resolution. In grievances where inmates threaten bodily harm to any person (Offense Code 212), use vulgar or insolent language toward an employee (Offense Code 222) or make false statements or charges against an employee (Offense Code 221), a charge may be issued in accordance with the provisions in Division Operating Procedure 861 "Inmate Discipline".

Due to the sensitive nature of Offense Code 221, "False statements or charges against an employee," it is imperative that the matter be investigated by an impartial party and handled with the utmost caution and fairness to avoid chilling the inmate's right to file complaints against employees.

866-7.9 *LIMITING AS A RESULT OF ABUSE.* It is imperative that all inmates be able to utilize their available administrative remedies in a timely manner. All inmates should use the grievance procedure in good faith for problem-resolution.

Inmates who abuse the grievance procedure by excessive filings or habitual misuse of the procedure hinder access by other inmates and impede staff's ability to investigate and resolve complaints within specified time limits.

Where an inmate is adjudged to be abusing the inmate grievance process, it is the responsibility of the Warden/Superintendent to regulate that inmate's usage of the regular and emergency grievance procedures. On a case-by-case basis, the Warden/Superintendent should review the inmate's usage of the grievance procedure and determine whether restriction of regular and/or emergency filings is needed.

An inmate may be restricted to no less than one grievance per week. The Warden/Superintendent will notify the inmate in writing of the reason for the limitation, the number of grievances he/she is limited to, and the length of time of the limitation. A copy of the notice will be provided to the Regional Director.

The inmate may grieve the limitation decision to the Warden/Superintendent without an informal resolution attempt being required. Application of the limiting procedure is appealable to the Regional Director at Level II.

866-7.10 *WITHDRAWAL OF GRIEVANCES BY INMATE.* An inmate may, at any time, voluntarily withdraw his/her grievance from any level of the procedure by completing the Withdrawal section on the Regular Grievance Form (Attachment 2 page 2). Subsequent grievances on the same issue should be determined as repetitive and should not normally be accepted, if the inmate has formally withdrawn the initial grievance.

866-7.11 *GRIEVABILITY.*

1. Grievable. The following matters are grievable by inmates:

   Procedures of the facility, region, division, and department **which affect the grievant personally**

   Actions of individual employees and/or inmates **which affect the grievant personally**, including any denial of access to the grievance procedure

   Reprisals against the grievant for filing a grievance or grievance appeal

   Issues concerning the Department's administration of the Interstate Compact Agreement **which affect the grievant personally**

   Any other matters relating to conditions of care or supervision within the authority of the Department **which affect the grievant personally**

2. Non-Grievable. The following matters are not grievable:

   Disciplinary hearing decisions, penalties and/or procedural errors, which may be appealed in accordance with Division Operating Procedure 861, "Inmate Discipline".

   State and Federal court decisions, laws, and regulations

   Policies, procedures and decisions of the Parole Board, Board of Corrections, Virginia Department of Transportation

(VDOT), the Department of Correctional Education (DCE), and other agencies

Other matters beyond the control of the Department

866-7.12 *REMEDIES.* The grievance procedure should afford a successful grievant a meaningful remedy when applicable. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary. All grievances determined as founded will be provided an administrative remedy and should, if necessary, include an inmate remedy. Remedies should include, but are not limited to, the following:

1. Administrative Remedies

Substance of procedure. Written change communicated effectively, promptly, as extensively as necessary, and with instructions including time limits for effecting the change.

Interpretation of procedure. Written explanation of revised interpretation communicated effectively, promptly, as extensively as necessary, and with instructions for effecting the change.

Application of procedure. Written direction to the relevant employee or employees to apply the procedure correctly, and, if necessary, with instructions for accomplishing the change. Disciplinary actions against employees, if appropriate, will not be communicated to inmate, but should be documented.

2. Individual Inmate Remedies.

Redress to the grievant as appropriate (for example, protection of the grievant, return/reimbursement of property, appropriate/prompt classification action, recomputation of time, timely medical attention or treatment, improvement of living conditions in a timely fashion).

866-7.13 *INFORMAL PROCEDURE.* Prior to submitting a formal grievance, the inmate should demonstrate that he/she has made a good faith effort to resolve the issue informally. The facility's implementation memorandum should specify how an inmate should attempt to resolve his/her complaints prior to submitting a formal grievance.

The time frame for staff response to an inmate's informal complaint should be no longer than 15 calendar days to ensure responses are provided prior to the expiration of the 30 day time requirement for an inmate to file his/her grievance.

866-7.14 *INITIATION OF REGULAR GRIEVANCE PROCEDURE.* Grievances are to be filed within 30 calendar days from the date of occurrence/incident or discovery of the occurrence/incident, except in instances: 1) beyond the inmate's control, or 2) where a more restrictive time frame has been established in Division Procedures to prevent loss of remedy or the issue from becoming moot. Once a grievance is filed, all records necessary to address the complaint should be made available to the designated person conducting the investigation.

1. Inmates are to use the Regular Grievance Form (Attachment 2) to file their own grievances. Regular grievance forms should be available to all inmates during waking hours. Assistance should be made available for inmates who are unable to complete the forms.

   Only one issue per grievance form will be addressed. The inmate is to write the issue in the space provided on the grievance form, preferably in ink. The inmate must either attach any required documentation of his/her attempt to resolve the issue or write the results of the informal resolution within the space provided on the grievance form, in accordance with the procedures established in the institution's Implementation Memorandum. If an inmate has supporting documents which he/she feels are relevant to the issue, he/she should be provided the opportunity to present them prior to the response at Level I.

   The original regular grievance (no photocopies or carbon copies) should be submitted by the inmate through the institutional mail system to the Warden/Superintendent's Office for processing by the Institutional Ombudsman/Grievance Coordinator. In cases where the inmate has been transferred, the inmate should submit the grievance to the institution where the complaint occurred.

   Grievances repetitive of a complaint previously filed through the regular grievance procedure or which contain threatening or vulgar language should not be accepted.

2. Intake. Incoming grievances are to be dated/date stamped on the working day received in the space provided on Page 1 of the Regular Grievance Form (Attachment 2).

   If the grievance meets the criteria for acceptance, the grievance should be logged into the Adult Grievance Information System (AGS) using the working day received. A receipt (Attachment 3) will be issued within two (2) working days from the date of receipt.

   If the grievance does not meet the criteria for acceptance, the grievance should be returned to the inmate within two (2) working days by completing the Intake section of the Regular Grievance Form (Attachment 2, Page 2) on the back of the grievance. A copy of all returned grievances and completed referral forms are to be maintained for documentation purposes in the inmate's individual grievance file.

   If an inmate wishes a review of the intake decision on any grievance, he/she may send the grievance to the appropriate Regional Ombudsman for a determination. The Regional Ombudsman should provide his/her decision to the inmate within five (5) working days. There is no further review of intake decisions.

   In the event of excessive filings by an inmate, the Institutional Ombudsman/ Grievance Coordinator should contact the Warden/Superintendent for a determination as to whether the limiting procedure should be instituted prior to initiating any

intake action. If it is the decision of the Warden/Superintendent to limit, all filings in question will be returned to the inmate with the written notification from the Warden of the initiation of the limiting procedure (refer to Section 866-7.9).

3. Special Concerns during the Intake Process.

Allegations of Physical Assault or Criminal Activity. Grievances alleging physical assault or criminal activity by employees or inmates should be brought to the attention of the Warden/Superintendent when received. The grievance should be logged and receipted according to the intake criteria and time limits.

Disciplinary Action. If a grievance is received which threatens harm to any person or contains vulgar and/or insolent language toward an employee, the inmate may be charged under the Inmate Disciplinary Procedure. The *original* grievance is forwarded to designated staff for review and possible disciplinary charge. The inmate is to be advised of this action by a *copy* of the grievance and referral notice on the back of the grievance form. The inmate is instructed that, in order to receive consideration, the returned grievance must be rewritten and submitted promptly without the inappropriate language.

866-7.15 *LEVELS OF REVIEW.* There are three (3) levels of review available for regular grievances. Each Level of response should state if an appeal is available and provide the title and address of the respondent for next available level of review, if applicable.

1. Level I, Warden or Superintendent. The Warden or Superintendent maintains the primary responsibility for responses to grievances at this Level within the time limits specified.

   Once the grievance is logged and receipted, the Institutional Ombudsman/Grievance Coordinator should review the content and determine the course of investigation. Investigation should include a face-to-face interview with the inmate to pinpoint the specific issue being grieved. The grievant should be given an opportunity to present any additional information that could not be included within the space on the grievance form.

   The response should include the following:

   the results of the informal process the facts (who, what, when, where, why) the procedure and content which govern the issue a determination of one of the following:

   –whether the complaint was founded or unfounded and, if founded, what remedy was taken, or will be taken within what time limit

   –whether the decision being appealed is upheld or reversed

   –whether the procedure being challenged needs revision

   the reason(s) for the determination instructions on the appeal process

   The Warden or Superintendent should ensure that appropriate investigation has

occurred and any remedy action has been taken.

2. Level II, Regional Director, Health Services Director, or Chief of Operations for Classification and Records.

Grievances over which the Regional Director has authority are forwarded to the appropriate Regional Office for response.

Grievances regarding actions or decisions of the Central Classification and Records Unit (including Central Classification Board decisions, time computation, Court and Legal actions, detainers, etc.) are reviewed and responded to by the Chief of Operations of the Classification and Records Unit. Those grievances concerning the Interstate Compact Agreement from Virginia inmates housed in states participating in the Agreement may be submitted directly to the Chief of Operations of Classification and Records for a response and are appealable to Level III of the procedure.

Grievances regarding Health Services procedures, and medical, dental, and mental health care are reviewed and responded to by the Director of the Office of Health Services.

If the Level I response does not contain sufficient information to arrive at the decision at Level II, the Level II respondent or designee should request the information from the Warden/Superintendent or designee who will ensure that the information is provided within the time frame established by Level II.

If the review at Level II supports the Level I response, the decision should indicate such. If the Level I response is not supported, the response will indicate the results of any additional investigation and any action to be taken within a specified time period.

The response at this level should indicate whether the issue qualifies for an appeal to the next level, and provide the name and address of respondent at the next level of appeal, if applicable. If there is no further appeal, the inmate should be advised that he/she has exhausted all administrative remedies.

3. Level III, Deputy Director or Director.

Grievances challenging the substance or interpretation of Division Procedures are appealable to the respective Deputy Director.

Grievances regarding decisions of the Publication Review Committee are appealable to the Deputy Director of Operations directly from Level I.

Grievances concerning the Interstate Compact Agreement from Virginia inmates participating in the Agreement are appealable to the Deputy Director of Operations.

Grievances challenging the substance or interpretation of Department Procedures are appealable to the Director.

Grievances appealed to the Deputy Director or Director's office will be reviewed to determine if they qualify for a response by this level. Grievances which do not qualify

will be returned to the inmate indicating such. Grievances which qualify for a Level III decision will be responded to by either the Deputy Director or the Director, as appropriate. The inmate will be advised that this is the last level of appeal and he/she has exhausted all administrative remedies.

866-7.16 *TIME LIMITS.* The total time allowed from initial submission of the regular grievance to the last level of review will not exceed one hundred and eighty (180) calendar days, including any authorized continuances.

1. Responses. Responses should be made within specified time limits at each level of decision. Expeditious processing of grievances at each level of decision is essential to prevent grievances from becoming moot. Time limits will be considered as beginning on the day the grievance is received at each level. The grievance form will indicate the date the response is signed. The time between the date received and mailed to the inmate should not exceed the time allotted for each level.

2. Specified Time Limits. Time limits for responses at each level for regular grievances are as follows:

   LEVEL I: 30 calendar days

   LEVEL II: 20 calendar days

   LEVEL III: 20 calendar days

3. Authorized Continuances. A regular grievance may be continued up to 30 calendar days beyond the specified time limits at

any level of the procedure for good reason(s). The inmate must be notified in writing of the continuance (Attachment 4) prior to the expiration of the specified time limit at any level. Grievances should be completed as soon as the reason justifying the continuance has ended or is no longer applicable.

Authorized continuances may be justified for the following reasons:

The principal(s) involved is unavailable to provide the information essential to the issue being grieved

Awaiting results of Central Investigative Unit or information from other facilities, divisions, or agencies

Unavailability of key staff due to escape, disturbance, or natural disaster

4. Expiration of a time limit (to include any authorized continuance) at any stage of the process shall qualify the grievance for appeal to the next level of review. The grievance will be returned promptly to the inmate. The respondent will advise the inmate on the grievance form of the option to advance the grievance and the appeal information (name/address for the next level of review).

5. The inmate should be allowed 5 calendar days upon receipt of a response to appeal to the next level, if such appeal is available.

866-7.17 *DISTRIBUTION AND RECORDKEEPING.* The original grievance with response(s) should be returned to the inmate and a copy of the grievance with responses from all appeals routed to the Institutional Ombudsman/Grievance Coordinator for filing in the inmate's grievance folder. The institution should maintain the official record of the inmate grievance with copies of each level's response.

866-7.18 *EMERGENCY GRIEVANCES*

Special provisions are made for responding to situations or conditions which may subject the inmate to immediate risk of serious personal injury or irreparable harm. It is the duty of all correctional employees to be responsive to grievances of an emergency nature.

1. Initiation. Emergency grievance forms should be available on a 24 hour basis for all inmates regardless of housing status. The facility's implementation memorandum or inmate orientation handbook should indicate how inmates can obtain and submit emergency forms. Inmates are to write their grievances on the standardized Emergency Grievance Form (Attachment 5) and submit the completed grievance form to a staff person. Use of threatening, vulgar or insolent language, or false allegations against staff, may subject the inmate to disciplinary charges as outlined in Section 866-7.8.

2. Intake. The staff person who received the grievance will determine what action needs to be taken in accordance with specific instructions outlined in the implementation memorandum.

If the grievance must leave the presence of the inmate, the receipt at the bottom of the emergency form should be completed by the staff person and provided to the inmate when the inmate submits the grievance. If a determination is made and the form is completed in the inmate's presence, the receipt section of the form should be struck through and "File" copy retained prior to *returning* the form to the inmate.

3. Response. The implementation memorandum will designate who may serve as respondents to grievances filed as emergencies. The respondent should review the issue, determine the course of action, and provide an appropriate response with reasons.

   If the issue does not subject the inmate to immediate risk of serious personal injury or irreparable harm, it is so indicated on the grievance form, signed with date and time of response by the designated staff person.

   If the issue subjects the inmate to immediate risk of serious personal injury or irreparable harm, the designated staff person should determine if he/she can address the issue or if the grievance should be forwarded to a higher authority for resolution. The grievance should receive response from the level at which corrective action can be taken.

4. Time limits. A grievance submitted as an emergency should be responded to within eight (8) hours. Grievances ruled as emergencies that will be mooted by the passage

of the time limit should receive immediate attention and appropriate action taken.

5. Distribution and Recordkeeping. The original grievance form with response goes to the inmate and the copy is routed to the Institutional Ombudsman/Grievance Coordinator for retention. Those grievances which are determined to be emergencies are logged into the Adult Grievance Information System (AGS) within two (2) working days of response. Those grievances which are determined as non-emergencies are not logged. All copies of emergency grievance forms submitted by an inmate should be filed in the inmate's grievance record for documentation purposes.

6. Monitoring. The Institutional Ombudsman/Grievance Coordinator should review the copies of grievances submitted through the emergency process and bring problem areas (including any allegations of criminal activity or physical assault) to the attention of the Warden/Superintendent.

866-7.19 *RECORDS.* Records of all regular and emergency grievances submitted at the institution, both logged and unlogged, will be maintained by the Institutional Ombudsman/Grievance Coordinator. The Adult Grievance Information System contains the official information of all logged grievances at each level of review. The Institutional Ombudsman/Grievance Coordinator should maintain monthly data regarding the number/reason for returns of regular grievances during the intake process, and the number of grievances submitted through the emergency process which were determined not

to be emergencies. This information should be included in the written monthly report [Section 866-7.20 (1)].

1. Retention. Copies of grievances, both regular and emergency, will be maintained at the unit for a minimum of three years following final disposition of the grievance. Grievances *concerning* matters known to be under litigation will be maintained until completion of the litigation.

2. Disposal of Records. Permission for disposal of grievance records must be secured in accordance with Departmental Procedure 1-8, Records Retention and Disposition.

3. Record Content. Grievances or copies of grievances will not be placed in an inmate's Central or Institutional files, except when the grievance has been used as evidence to substantiate a disciplinary action taken in accordance with Section 866-7.8. Copies of grievances should be maintained in the grievance files of the institution, regional office and central office.

4. Confidentiality. Grievance records will be maintained in accordance with provisions outlined in Division Operating Procedure 803, Privacy and Security of Inmate Records. Information on grievances should only be available to employees on a need-to-know basis, as determined through the Warden/Superintendent's office.

866-7.20 *Monitoring.* The Inmate Grievance Procedure will be monitored by the Institutional Ombudsman/Grievance Coordinator at the institutional level and by the Ombudsman Services Unit at the regional and central office levels on a regular basis.

1. The Institutional Ombudsman/Grievance Coordinator will regularly monitor the institutional grievance procedure for compliance. As part of this monitoring process, the Institutional Ombudsman/Grievance Coordinator will provide to the Warden or Superintendent a written monthly report regarding the operation of the grievance procedure for the previous month. A copy of the monthly report is to be sent to the Regional Ombudsman for monitoring purposes.

2. The inmate grievance procedure will be monitored by the Ombudsman Services Unit through institutional visits, review of the Institutional Ombudsman/Grievance Coordinator's monthly report, and the usage of information contained in the Adult Grievance Information System.

866-7.21 *Evaluation.* An evaluation of the inmate grievance procedure will be conducted on an annual basis by the Ombudsman Services Unit to ascertain the effectiveness of the process statewide and any need for revision to this procedure.

PART III

ADMINISTRATION

866-8.0 *OFFICE OF PRIMARY RESPONSIBILITY*

The Deputy Directors are responsible for ensuring that Level III actions are in compliance with this Operating Procedure.

The Regional Directors, Chief Of Operations for Classification and Records, and the Director of Health Services are responsible for ensuring that Level II actions are in compliance with this Operating Procedure.

The Warden/Superintendent is responsible for implementation of this Operating Procedure and for issuance of the facility's implementation memorandum which is in compliance with this Operating Procedure.

The Program Manager of the Ombudsman Services Unit is responsible for the monitoring and annual evaluation of the inmate grievance process.

866-9.0 *SUPERSESSION*

This operating procedure supersedes Department Procedure 10-2, Inmate Grievance Procedures dated August 11, 1993.

866-10.0 *REFERENCES*

Standards for State Correctional Facilities, January 16, 1998, Board of Corrections; Standards 300-4, and 330-3.

Virginia Department of Corrections, Division of Operations Procedures 803, 851, 852, 856, and 861

Federal Prison Litigation Reform Act (PLRA)

Federal Civil Rights of Institutionalized Persons Act (CRIPA)

Code of Virginia: 8.01-243.2

866-11.0 *REVIEW DATE* These procedures will be reviewed as necessary.

/s/ Gene M. Johnson
Gene M. Johnson
Deputy Director
Division of Operations

DOP 866
Attachment 1

Virginia Department of Corrections
Inmate Grievance Procedure
Initial Notification Form

This brochure serves to notify inmates of the grievances procedure which is available to address complaints within the Virginia Department of Corrections.

Division Operating Procedure 866 'INMATE GRIEVANCE PROCEDURE' outlines statewide provisions for grievance processes in the Department's Division of Operations. Each institution in the Division has an Institutional Implementation Memorandum 866 which outlines how the grievances process operates at that facility. Each facility also employs an Institutional Ombudsman/Grievance Coordinator who is responsible for the day to day operation and overall monitoring of the institution's procedure.

Federal and state laws require inmates to exhaust available administrative processes prior to filing lawsuits concerning conditions of incarceration. An inmate must complete the REGULAR grievance procedure prior to initiating such litigation; the filing of an emergency grievance does not satisfy the exhaustion requirement.

Each inmate is entitled to use the inmate grievance procedure. All inmates are to receive an explanation of the facilities' inmate grievance procedure during orientation.

Inmates are advised they are accountable for how they use the grievance process. Using threatening or vulgar/insolent language, or making false statements against employees may be dealt with under the Inmate Disciplinary Procedure in Division Operating Procedure 861. Additionally, inmates using the process other than in good faith may be limited by the Warden/Superintendent.

In accordance with Division Operating Procedure 866 'Inmate Grievance Procedure':

- Grievable issues include:
    - ⇒ Procedures of the facility, region, division and department which affect the grievant personally
    - ⇒ Actions of individual employees and/or inmates which affect the grievant personally, including any denial of access to the grievance procedure
    - ⇒ Reprisals against the grievant for filing a grievance or appeal
    - ⇒ Issues concerning the Department's administration of the Interstate Compact Agreement which affect the grievant personally

- ⇒ Any other matters relating to the conditions of care or supervision within the authority of the Department which affect the grievant personally

- Non-grievable issues include:
  - ⇒ Disciplinary hearing decisions, penalties, and/or procedural errors which may be appealed in accordance with Division Operating Procedure 861, 'Inmate Discipline'.
  - ⇒ State and Federal court decisions, laws, and regulations
  - ⇒ Policies, procedures and decisions of the Parole Board, Board of Corrections, Virginia Department of Transportation (VDOT), the Department of Correctional Education (DCE), and other agencies
  - ⇒ Other matters beyond the control of the Department
- An inmate must try to informally resolve the issue prior to filing a regular grievance. The Institutional Implementation Memorandum 866 outlines what informal process must be used at the facility for complaint resolution.
- Regular grievance forms are available at all waking hours.
- An inmate has 30 calendar days from the date of incident/occurrence to file a regular grievance with the facility where the incident occurred.
- All regular grievances should be submitted by the inmate to the Warden/Superintendent's Office through the institutional mail system.
- There is an emergency grievance procedure for situations which may subject the inmate to immediate risk

of serious personal injury or irreparable harm. Emergency grievance forms are available on a 24 hour basis. There is an eight (8) hour time limit on this type of grievance due to the serious nature of the complaint.

- Division Operating Procedure 866 and the Institutional Implementation Memorandum 866 are available for review in locations accessible to inmates. For details of the grievance process at any facility, please review the Institutional Implementation Memorandum 866 and/or consult with the Institutional Ombudsman/Grievance Coordinator.

INSTRUCTIONS FOR FILING. You are required per Division Operating Procedure 866 "Inmate Grievance Procedure" to attempt to resolve your complaint in good faith prior to filing a regular grievance. The Institutional Implementation Memorandum 866 details the informal process to use. You must submit your grievance within 30 days from the date of occurrence or discovery of incident. Only one issue per grievance will be addressed. Write your issue only in the space provided on the grievance form, preferably in ink. Regular grievances are submitted through the institutional mail to the Warden/Superintendent's office and a receipt issued within 2 working days from received date if the grievance is not returned during Intake.

INTAKE. Grievances should be accepted for logging unless returned for the following reason(s):

__ **Non-grievable.** This issue has been defined as non-grievable in accordance with Division Operating Procedure 866.

__ Disciplinary Procedure. You may appeal hearing decisions, penalties, and/or procedural errors

under the provisions in Division Operating Procedure 861. 'Inmate Discipline'.

__ Matters beyond the control of the Department of Corrections.

__ **Limited.** You have been limited by the Warden/Superintendent.

__ **Expired Filing Period.** Grievances are to be filed within 30 calendar days from date of occurrence/incident, or discovery of the occurrence/incident, except in instances: 1) beyond the inmate's control or, 2) where a more restrictive time frame has been established in Division procedures to prevent loss of remedy or the issue from becoming moot.

__ **Repetitive.** This issue has been grieved previously in grievance # _____.

__ **Inquiry on behalf of other inmates.**

__ **Group Complaints or Petitions.** Grievances are to be submitted by individuals.

__ **Vulgar/Insolent or Threatening Language.** YOU MAY BE CHARGED IN ACCORDANCE WITH THE PROVISIONS IN DIVISION OPERATING PROCEDURE 861 'INMATE DISCIPLINE'. The unacceptable language has been highlighted. To receive consideration you are instructed to rewrite and submit your grievance promptly without the inappropriate language.

__ **Photocopy/Carbon Copy.** You must submit the original grievance for response and appeal.

__ **Grievance Filed Regarding Another Institution.** This grievance is being returned to you for you to submit to the appropriate institution.

__ **Informal Procedure.** You have not used the informal process to resolve your complaint.

__ **Insufficient Information.** You need to provide the following information before the grievance can be processed:

Institutional Ombudsman/
Grievance Coordinator: _____ Date: _____

REGIONAL REVIEW of INTAKE (within 5 working days of receipt):

__ The intake decision is being upheld in accordance with the criteria in Division Procedure 866 'Inmate Grievance Procedure'

__ The grievance meets the criteria for intake and is being returned to the Warden/Superintendent for logging.

Regional Ombudsman: _____ Date: _____

WITHDRAWAL of GRIEVANCE:

I wish to voluntarily withdraw this grievance. I understand that by withdrawing this grievance, there will be no further action on this issue nor will I be able to file any other grievances in the future of this issue.

Inmate Signature: _____ Date: _____

Staff Witness: _____ Date: _____

DOP 866
Attachment 3

VIRGINIA DEPARTMENT OF CORRECTIONS
ADULT GRIEVANCE RECEIPT FORM

LOG: _____
LOC: _____

On this date: _____, I have received a statement form:

_____ of _____
(Inmate Name and Number) (Name of Facility)

setting out the following complaint:

(Explanation/statement from Comment Line)

_____ _____
(Signature) (Title)

_____

DOP 866
Attachment #4

Virginia Department of Corrections
Inmate Grievance Procedure
Notice of Continuance

Inmate: _____ Number: _____

From: _____

Date: _____

In accordance with Division Operating Procedure 866, 'Inmate Grievance Procedure' a regular grievance may be continued up to 30 calendar days beyond the specified

time limits at any level of the procedure for good reason(s).

You are being notified that grievance log # _____ requires additional time at Level ____ for investigation and/or response for the following reason(s):

- ☐ The principal/s involved is unavailable to provide the information essential to the issue being grieved
- ☐ Awaiting results of Central Investigative Unit or information from other facilities, divisions, or agencies
- ☐ Unavailability of key staff due to escape, disturbance, or natural disaster

Your grievance will be returned to you no later than _____.

Comments: _____
_____
_____
_____
_____

Served by _____ Date _____

Inmate Signature _____ Date _____

Distribution: Original to inmate
Copy to Inmate Institutional Grievance File

_____

DOP 866
Attachment 5

VIRGINIA DEPARTMENT OF CORRECTIONS
EMERGENCY GRIEVANCE FORM

Log # _____

Definition: Emergencies are defined as situations or conditions which may subject the inmate to immediate risk of serious personal injury or irreparable harm.

Inmate Last Name	First	No.	Institution/ Bldg.#	Cell #

PART A – INMATE CLAIM

What is the emergency? _____

_____

_____

_____

_____

_____ _____

Date/Time Signature of Inmate & Number

_____

PART B – STAFF RESPONSE

(This part is to be completed and returned to the inmate within eight (8) hours.)

[ ] Your grievance does not meet the definition for an emergency. Reason/s:

_____

_____

_____

_____

[ ] Your grievance has been determined to be an emergency and the following action has been taken:

_____

_____

_____

_____

_____

_____

_____

_____ _____

Date/Time Respondent/Title

_____

Distribution: Original Grievance returned to Inmate
Copy forwarded to Institutional Ombudsman/Grievance Coordinator

_____

[Detach here]

PART C – RECEIPT Log # _____

_____ _____ _____

Inmate Last Name | First | No. | Institution/ Bldg.# | Cell #

I acknowledge receipt of this complaint from the above inmate. [Complete and issue to inmate if taking from his/her presence for response.]

_____ _____

Date/Time Recipient's Signature (Staff Member)

_____

DOP 866
Attachment 6

INMATE GRIEVANCE RESPONSE FORM
LEVEL I

Inmate Name/Number	Institution	Log Number

LEVEL I: WARDE/SUPERINTENDENT'S RESPONSE
(To be completed and mailed within 30 calendar days.)

If you are dissatisfied with the Level I response, you may appeal within 5 calendar days to:

Regional Director, Virginia Department of Corrections (address)

OR

(for Classification appeals) Chief of Operations, Classification and Records Unit, Post Office Box 26963, Richmond, Virginia 23261-6963

OR

(for health services procedures, or medical, dental or mental health care) Director of Health Services, Post Office Box 26963, Richmond, Virginia 23261-6963

Warden/Superintendent	Date

I wish to appeal the Level I response because: _____

Inmate Signature _____ Date _____

DOP 866
Attachment 7

INMATE GRIEVANCE RESPONSE FORM
LEVEL II

Inmate Name and Number _____ Institution _____ Log Number _____

LEVEL II: Regional Director, Health Services Director, or Chief of Operations for Classification and Records Response (To be completed and mailed within 20 calendar days.)

Level II is the last level of appeal for this grievance.

OR

This grievance is appealable to Level III. You may appeal by mailing the grievance within 5 calendar days to the Deputy Director, Post Office Box 26963, Richmond, Virginia 23261-6963.

Regional Director/Health Services Director/Chief of Operations for Classification and Records _____ Date _____

I wish to appeal the Level II response because:

_____

DOP 866
Attachment 8

INMATE GRIEVANCE RESPONSE FORM
LEVEL III

Inmate Name and Number	Institution	Log Number

LEVEL III: Deputy Director/Director Response (To be completed and mailed within 20 calendar days.)

_____ Date _____

DEPUTY DIRECTOR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

KEVIN BALLANCE,	) **Civil Action**
Plaintiff,	) **NO. 7:01-cv-00410**
	)
v.	) **ORDER**
RON ANGELONE, *et. al.*,	) **(Filed Aug 3, 2001)**
	)
Defendant(s).	) **By: Hon. James C. Turk**
	) **United States District**
	) **Judge**

In accordance with the Memorandum Opinion entered this day, it is hereby

ADJUDGED and ORDERED

as follows:

(1) As to the following claims, this action shall be and hereby is **DISMISSED** without prejudice, pursuant to 28 U.S.C. §1915A(b)(1): Claim 1, Claim 2, Claim 4 (as to all due process claims and as to retaliation claims concerning confiscation of the following items: 400 pages of TV Guide, 2000 magazine pages, six writing pens, eleven picture frames, and dandruff shampoo), and Claim 5. Because the court hereby dismisses all claims alleged against the following defendants, all parties are hereby notified that these individuals are no longer considered parties to the action: Sgt. Stanley and R. A. Young.

(2) As plaintiff has now satisfied prefiling requirements, the clerk is hereby **DIRECTED** to attempt service of process of the remaining claims upon the following defendants in the usual manner: Ron Angelone,

Gene M. Johnson, S. K. Young, and Correctional Officers Anderson, Younce and Edwards.

(3) Once served, the defendants shall file their responsive pleadings within sixty (60) days from the date set forth on the enclosed Notice of Lawsuit if the defendants choose to return the enclosed Waiver of Service of Summons form within thirty (30) days of that same date. See gen. Rule 4(d) of the Federal Rules of Civil Procedure. The defendants may choose to waive the filing of a reply pursuant to 42 U.S.C. §1997e(g). Such a waiver shall be made by way of a formal pleading.

(4) If the defendant(s) dispute plaintiff's assertions that he has fully exhausted administrative remedies, defendant(s) may raise this issue by way of a motion to dismiss for failure to exhaust. Such a motion may be made in conjunction with the responsive pleadings required in Paragraph (2), but shall not be made in lieu of such responsive pleadings. Such a motion to dismiss for failure to exhaust must be accompanied by an assertion that the plaintiff currently has available to him a grievance procedure through which he may address the matters complained of in the complaint. Defendants other than employees of the Virginia Department of Corrections may wish to attach to their motion to dismiss a copy of the applicable grievance procedure.

(5) The plaintiff is hereby granted 20 days from the receipt of a copy of defendants' answer and other responsive pleadings within which to file opposing affidavits or other appropriate material, if he be so advised. Failure to so respond may result in the entry of judgment against the plaintiff on the basis of defendants' responsive pleading;

(6) Parties are referred to Rule 5 of the Federal Rules of Civil Procedure which requires that every pleading

after the complaint and every written motion, notice, or other similar paper be served on all parties, which service shall be made by mailing it to the parties' attorney;

(7) Both sides are advised that pursuant to Standing Order of Court entered May 3, 1996, and Rule 83(b) of the Federal Rules of Civil Procedure, the Court may direct the parties in a prisoner civil rights case to file a motion for summary judgment supported by affidavits.

(8) Parties are advised that pursuant to Standing Order of Court entered September 19, 1988, all nondispositive orders in this case will be referred to the Hon. Glen E. Conrad, United States Magistrate Judge. (See Appendix);

(9) Plaintiffs shall notify the Court immediately upon his transfer or release and shall provide a new address if known. FAILURE TO NOTIFY THE COURT OF SUCH A CHANGE OF ADDRESS WILL RESULT IN DISMISSAL OF THIS CASE.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendant(s).

ENTER: This 3rd day of August, 2001.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL BOTTOMS,	)	**Civil Action No.**
Plaintiff,	)	**7:00-cv-00506**
	)	**Order**
v.	)	
STAN K. YOUNG, *et al.*	)	(Filed Jan. 5, 2001)
Defendants.	)	**By: Hon. Jackson L. Kiser**
	)	**Senior U.S. District Judge**

In accordance with the accompanying memorandum opinion, it is hereby **ADJUDGED** and **ORDERED** as follows:

(1) Defendant's[1] motion to dismiss shall be and hereby is **DENIED.**

(2) Defendant's[2] motion for protective order shall be and hereby is **DENIED.**

(3) Defendants[3] are hereby **DIRECTED** to submit within thirty (30) days from the date of entry of this order an answer to plaintiff's claims and any motion for summary judgment, supported by affidavits. If the court receives no additional dispositive motions from the institutional defendants within the time allotted, the court shall set the case for a trial as to such defendants.

---

[1] Stan K. Young Sgt Kendricks, C. O. Bliley, Capt. Taylor, Gary K. Aronhalt, Ron Angelone, Gene Johnson, R. A. Young, and Major Yates.

[2] *Id.*

[3] *Id.*

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendants.

ENTER. This 5th day of January 2001.

/s/ Jackson L. Kiser
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL BOTTOMS,	) **Civil Action**
Plaintiff,	) **No. 7:00-cv-00506**
	)
v.	) **Memorandum Opinion**
STAN K. YOUNG, *et al*,	) **(Filed Jan. 5, 2001)**
	)
Defendants.	) **By: Hon. Jackson L. Kiser**
	Senior U.S. District Judge

Plaintiff Michael Bottoms, a Virginia inmate proceeding *pro se*, brings this action under the Civil Rights Act, 42 U.S.C. §1983, with jurisdiction vested pursuant to 28 U.S.C. §1343. In the remaining allegations of his complaint, plaintiff contends that, while incarcerated at Wallens Ridge State Prison (WRSP), his rights were violated because he was subjected to unconstitutional living conditions. Plaintiff names as defendants various officials within the Virginia Department of Corrections (VDOC) and at WRSP, as well as Stun Tech, Inc. He seeks injunctive and monetary relief.

The defendants[1] through counsel, have filed a motion to dismiss and a motion for protective order against

---

[1] There are at least two different sets of defendants remaining in the present action, the institutional defendants (Stan K. Young, Sgt. Kendricks, C/O Bliley, Capt. Taylor, Gary K. Aronhalt, Ron Angelone, Gene Johnson, R.A. Young, and Major Yates) and Stun Tech, Inc. To date, only the Institutional defendants have made an appearance in the case. Thus it is the institutional defendants who have filed a motion to dismiss and therefore, unless otherwise stated, the term "defendants" used herein will refer only to that set of defendants.

discovery. By order dated October 23, 2000 the court notified the plaintiff of the defendant's motion to dismiss as required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and warned plaintiff that judgment might be granted for the defendant if plaintiff did not respond to the motion. Plaintiff has now responded thus the matter is ripe for the court's consideration. Upon review of the record, I must deny both motions made by the defendants.

Defendants have moved to dismiss Bottoms' complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that this court lacks subject matter jurisdiction over his §1983 claims because he has not exhausted his administrative remedies in accordance with 42 U.S.C. §1997e(a). Section 1997e(a) of the Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under Section 1983, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted" 42 U.S.C. §1997e(a). At the outset, it is noted that §1997e(a) has not been found by the courts of this circuit to impose exhaustion of administrative remedies as a prerequisite to jurisdiction. Thus, the fact that there are claims within the complaint that may not have been exhausted does not deprive this court of subject matter jurisdiction to rule on such claims. *See, e.g., Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) (in contrast to statutes that require exhaustion of administrative remedies as a prerequisite to jurisdiction" § 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. §1331"). Moreover, the fact

that this court routinely reviews cases falling within the ambit of the PLRA, prior to any determination by the court regarding a plaintiff's full exhaustion of a particular claim, should indicate to the defendants that the court does not believe § 1997e(a) acts as a prerequisite to its subject matter jurisdiction.[2] Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be denied.

As to any of Bottoms' claims which the defendants argue have not been fully exhausted within the meaning of §1997e(a). Bottoms represented to the court in a verified statement that he had in fact exhausted all administrative remedies as to each claim. He alleges that, to the extent some of his claims were not fully prosecuted through the various levels of the grievance procedure, his efforts to so exhaust his administrative remedies were frustrated by prison officials. Bottoms claims that he signed a withdrawal form "under duress after being threatened by [a correctional officer who was] pointing [a] shot gun at [him]"[3] Section §1997e(a) requires that

---

[2] For example, this court frequently dismisses *sua sponte*, complaints on the basis that they fail to state a claim upon which relief may be granted or that they are malicious or frivolous, consistent with the PLRA, without first making an initial determination on jurisdiction based on exhaustion.

[3] With regard to the only remaining claim, relating to the defendants' alleged deliberate indifference to Bottoms' future health in their use of a certain stun belt, plaintiff filed both an informal complaint and a regular grievance. However, the plaintiff subsequently withdrew the regular grievance and did not pursue his complaint through the various levels of administrative appeals allegedly because of threats by prison officials.

"such administrative remedies as are available [must be] exhausted" The requirement of availability has been construed by the courts of this circuit to mean "accessible," "within one's reach," "at one's disposal." *See Langford v. Couch*, 50 F.Supp.2d 544, 547 (E.D. Va. 1999). Inasmuch as the allegations of the plaintiff and the defendants create a genuine issue of material fact as to whether Bottoms exhausted his "available" remedies as to his remaining claim. I must deny the motion to dismiss.

Even if I were to find that the plaintiff had adequate access to the grievance procedure, to the extent that Bottoms' remaining claims concern actions occurring more than thirty (30) days ago, dismissal would be inappropriate in that any attempt by Bottoms to further exhaust such claims under the Adult Inmate Grievance Procedure would be futile. The defendants acknowledge as much by specifically directing the court's attention to Departmental Operating Procedure 866 (DOP 866) Defendants cite to DOP 866 for the proposition that "grievances are to be filed within thirty (30) calendar days from the date of [an] occurrence or incident." All of the events of which Bottoms complains, that remain as claims in this case, occurred more than thirty (30) days ago. Defendants do not offer any evidence demonstrating that Bottoms' claims fall under any exception to the thirty (30) day limit or that he otherwise has any administrative remedies available to him now regarding the events of which he complains. In fact, the defendants plainly admit that the time limit in which Bottoms had to file a regular grievance on these issues has expired. Accordingly, I find that the requirements under § 1997e(a) have been met in that

Bottoms has no remaining available remedies to exhaust. Thus, the motion to dismiss is denied.

For the foregoing reasons, the defendant's motion to dismiss is denied. Accordingly, the motion for protective order must also be denied. Pursuant to the Standing Order of Court entered May 3, 1996, and Rule 83(b) of the Federal Rules of Civil Procedure, the defendants[4] are directed to file a motion for summary judgment with supporting affidavits.

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to plaintiff and to counsel of record for the defendants.

ENTER this 5th day of January, 2001.

/s/ Jackson L. Kiser
Senior U.S. District Judge

---

[4] Stan K. Young, Sgt. Kendricks C/O Bliley, Capt. Taylor, Gary K. Aronhalt, Ron Angelone, Gene Johnson, R.A. Young, and Major Yates.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JUANNITO H. EDWARDS, **Plaintiff,**	**Civil Action No. 7:00-cv-00657**
v.	**ORDER**
T. YATES, *et al.*	(Filed Jan. 17, 2001)
Defendants.	**By: Hon. Jackson L. Kiser Senior U.S. District Judge**

In accordance with the accompanying memorandum opinion, it is hereby **ADJUDGED** and **ORDERED** as follows:

(1) Defendants'[1] October 26, 2000 motion to dismiss shall be and hereby is **DENIED.**

(2) Plaintiff's December 22, 2000 motion to amend is **GRANTED,** therefore adding as defendants to this action J. Salver and Counselor Huff.

(3) However, all claims within plaintiff's December 22, 2000 motion to amend are **DISMISSED** without prejudice in accordance with 28 U.S.C. §1915A(b)(1).[2]

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendants.

---

[1] Major T. Yates, Lieutenant J. C. Combs, R. A. Young and S. K. Young.

[2] Accordingly, the defendants named in the motion to amend. J. Salyer and Counselor Huff, are dismissed from this action.

ENTER. This 17th day of January 2001.

/s/ Jackson L. Kiser
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JUANNITO H. EDWARDS,	**Civil Action**
Plaintiff,	**No. 7:00-cv-00657**
v.	**Memorandum Opinion**
T. YATES, *ET AL*,	**(Filed January 17, 2001)**
Defendants.	**By: Hon. Jackson L. Kiser**
	Senior U.S. District Judge

This matter is before the court pursuant to the defendants' motion to dismiss and a motion to amend filed by the plaintiff. Plaintiff Juannito H. Edwards, a Virginia inmate proceeding *pro se*, brings this action under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction vested pursuant to 28 U.S.C. § 1343. Plaintiff contends that, while incarcerated at Wallens Ridge State Prison (WRSP), his rights under the First and Eighth Amendments to the United States Constitution were violated in that he was subjected to retaliatory actions for exercising his right to petition the government for redress of his grievances as well as cruel and unusual punishment and inhumane living conditions. Plaintiff names as defendants various officials within the Virginia Department of Corrections (VDOC) and at WRSP. He seeks declaratory injunctive and monetary relief. Edwards seeks to amend his complaint to add a claim of due process violations, naming two additional defendants related thereto. For the following the [sic] reasons the motion to dismiss must be denied and the motion to amend granted. However, because the claims contained within the motion to amend are not

sufficient to state a constitutional claim, they must be dismissed.

The defendants,[1] through counsel, filed a motion to dismiss on October 26, 2000.[2] By order dated October 28, 2000, the court notified the plaintiff of the defendant's motion to dismiss as required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and warned plaintiff that judgment might be granted for the defendants if plaintiff did not respond to the motion. Plaintiff has now responded, thus the matter is ripe for the court's consideration. Upon review of the record, I must deny the motion to dismiss.

Defendants have moved to dismiss Bottoms' complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that this court lacks subject matter jurisdiction over his § 1983 claims because he has not exhausted his administrative remedies in accordance with 42 U.S.C. § 1997e(a). Section 1997e(a) of the Prison Litigation Reform Act (PLRA) provides that "[n]o action shall

---

[1] As originally filed, the defendants presenting this motion were Major T. Yates and Lieutenant J.C. Combs. However, since the time of that initial filing the plaintiff has added as defendants to this action R.A. Young and S.K. Young. Inasmuch as there is one counsel now representing all of these defendants and there are no other defendants, this motion will be considered as to all four defendants.

[2] I am aware that the defendants have also filed a motion to dismiss for failure to state a claim. As to that motion, the plaintiff has requested and been granted additional time within which to respond. In passing, I note that the motion to dismiss this action for failure to state a claim does not address all of the claims contained within the plaintiff's complaint and, even if granted would not result in the dismissal of this case.

be brought with respect to prison conditions under section 1983 . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). At the outset, it is noted that § 1997e(a) has not been found by the courts of this circuit to impose exhaustion of administrative remedies as a prerequisite to jurisdiction. Thus, the fact that there are claims within the complaint that may not have been exhausted does not deprive this court of subject matter jurisdiction to rule on such claims. *See, e.g., Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) (in contrast to statutes that require exhaustion of administrative remedies as a prerequisite to jurisdiction "§ 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. § 1331"). Moreover, the fact that this court routinely reviews cases falling within the ambit of the PLRA, prior to any determination by the court regarding a plaintiff's full exhaustion of a particular claim, should indicate to the defendants that the court does not believe § 1997E(A) acts as a prerequisite to its subject matter jurisdiction.[3] Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be denied.

As to any of Edwards' claims which the defendants argue have not been fully exhausted within the meaning

---

[3] For example, this court frequently dismisses *sua sponte*, complaints on the basis that they fail to state a claim upon which relief may be granted or that they are malicious or frivolous, consistent with the PLRA, without first making an initial determination on jurisdiction based on exhaustion.

of § 1997e(a), Edwards has represented to the court in various pleadings that he has exhausted all available administrative remedies as to each of his claims. He alleges that, to the extent some of his claims were not fully prosecuted through the various levels of the grievance procedure, his efforts to so exhaust his administrative remedies were frustrated by prison officials. Section §[sic]1997e(a) requires that "such administrative remedies as are available [must be] exhausted." The requirement of availability has been construed by the courts of this circuit to mean "accessible," "within one's reach," "at one's disposal." *See Langford v. Couch*, 50 F.Supp. 2d 544, 547 (E.D. Va. 1999). Because the allegations of the plaintiff and the defendants create a genuine issue of material fact as to whether Edwards exhausted his "available" remedies, I must deny the motion to dismiss.

Even if I were to find that the plaintiff had adequate access to the grievance procedure, inasmuch as Edwards' claims concern actions occurring more than thirty (30) days ago, dismissal would be inappropriate in that any attempt by Edwards to further exhaust such claims under the Adult Inmate Grievance Procedure would be futile. It is noted that the filing of administrative grievances within the VDOC is governed by Departmental Operating Procedure 866 (DOP 866).[4] DOP 866 provides that "grievances are to be filed within thirty (30) calendar days from the date of [an] occurrence or incident." All of the events

---

[4] Although neither party has submitted to the court any documents evidencing DOP 866, I am aware of such policy and hereby take judicial notice of the fact that that policy governs the inmate grievance procedure.

of which Edwards complains occurred more than thirty (30) days ago. Defendants do not offer any evidence demonstrating that Edwards' claims fall under any exception to the thirty (30) day limit or that he otherwise has any administrative remedies available to him now regarding the events of which he complains. Accordingly, I find that the requirements under § 1997e(a) have been met in that Edwards has no remaining available remedies to exhaust. Thus, the motion to dismiss must be denied.

In his motion to amend plaintiff seeks to add claims related to a disciplinary hearing. Specifically, Edwards complains that, prior to the hearing, he was only allowed one brief meeting with the counselor representing his interest at the hearing, that his counselor did not provide him any assistance in obtaining the names of certain witnesses or otherwise prepare a defense for him, that he was therefore unable to submit witness statements or present witnesses or material evidence at his hearing, that he was not furnished with any investigative reports prior to the hearing, and that the officer presiding over his hearing was partial. As a result of the hearing the plaintiff asserts that he lost all good time and was assigned to segregation. Edwards states that he appealed the disciplinary decision but that such decision was upheld. In connection with these new allegations, Edwards names as defendants J. Salyer and a counselor Huff.

Upon consideration of the amendment I am of the opinion that the claims contained therein should be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted. To state a cause of action under § 1983, a plaintiff must establish

that he has been deprived of rights guaranteed by the Constitution or laws of the United States and that this deprivation resulted from conduct committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42 (1988). Plaintiff's claims appear to be based on conduct committed by persons acting under color of state law in that he complains of actions taken by officials at WRSP. However, a claim filed by an inmate challenging the conduct of an "officer or employee of a governmental entity" may be dismissed under § 1915A(b)(1) if the claim is "frivolous, malicious or fails to state a claim upon which relief may be granted." Because the allegations in the motion to amend do not establish any facts to suggest the plaintiff has been deprived of constitutionally protected rights, I must dismiss them for failure to state a claim upon which relief can be granted.

Edwards amendment claims that he has been denied the due process rights guaranteed him under the Fourteenth Amendment. However, an inmate is not automatically entitled to federal due process protections merely because a punitive purpose underlies an action affecting his privileges *Sandin v. Conner*, 515 U.S. 472 (1995). In fact, an inmate has no right to due process even in the context of a disciplinary hearing unless the punishment imposed represents a dramatic departure from the sentence contemplated by the inmate's criminal conviction or the institutional conviction will inevitably affect the duration of his sentence. *Id.* In other words, where a change in a prisoner's housing assignment or a loss of privileges does not depart dramatically from the basic conditions of his sentence he has no claim for relief under the Due Process Clause, even if the change occurred without all

the State-created procedural protections. *Id.* Of course, state regulations may require more stringent procedural protections before such a change can occur.[5] But state employees' failure to abide by state procedural law is not a federal due process issue cognizable under § 1983. *Riccio v. County of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. 1990). Thus even assuming that officials did not fully comply with due process requirements under state regulations, violations of state law alone are insufficient to give rise to a constitutional claim. *Riccio, supra.* Because Edwards' assignment to segregation resulting from his disciplinary conviction is not sufficient to constitute a dramatic departure from the normal and expected condition of a prison sentence, *See Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997), he has failed to state a claim that he has been deprived of a federally protected liberty interest without due process. *Sandin, supra.*

Insofar as Edwards could be arguing that he was entitled to due process because the conviction resulted in a deprivation of his good time or otherwise affected the length of his sentence to be served, this argument would fall short in that his state habeas remedies have not been exhausted nor has his sentence been invalidated. To the extent Edwards seeks to have his good time restored, his amendment must be construed as a petition for writ of habeas corpus and dismissed for failure to exhaust his state remedies. *See Ross v. Keelings*, 2 F. Supp. 2d 810, 814

---

[5] It is noted that the plaintiff has provided no evidence that such state procedural protections exist. However, for the purpose of reviewing the claims contained within the motion to amend *sua sponte*, I have assumed as much.

(E.D. Va. 1998) Inasmuch as he seeks monetary relief related to this claim such a claim for damages by a state inmate is not cognizable under § 1983 if a judgment for the plaintiff would imply the invalidity of his sentence or sentence computation, absent a showing by the inmate that the sentence or sentence computation has already been invalidated. *See Heck v. Humphrey*, 512 U.S. 477 (1994), *Edwards v. Balisok*, 520 U.S. 641, 643 (1997). Because he fails to provide any evidence that his sentence or sentence computation has previously been invalidated with regard to the denial of due process of which is now complaining, his claim for monetary damages must be dismissed in accordance with *Heck. See Ross*, 2 F.Supp.2d at 814-15. Accordingly, Edwards has failed to state a due process claim and therefore the claims contained within the current motion to amend must be dismissed.

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to plaintiff and to counsel of record for the defendants.

ENTER: This 17th day of January, 2001.

/s/ Jackson L. Kiser
Senior U.S. District Judge

KEVIN JOHNSON, Plaintiff, v. PAGE TRUE, et al., Defendant(s)

Civil Action NO. 7:00-cv-00352

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

125 F. Supp. 2d 186; 2000 U.S. Dist. LEXIS 19074

November 17, 2000, Decided

DISPOSITION: Defendant's motions to dismiss DENIED; Defendants motion for protective order DENIED; Plaintiff's motion for an extension of time within which to respond to the medical defendants motion for summary judgment GRANTED.

COUNSEL: KEVIN JOHNSON, plaintiff, Pro se, BIG STONE GAP, VA.

For PAGE TRUE, JERRY ARMENTROUT, YVONNE ELSWICK, SECURITY CHIEF YATES, RICHARD ROWLETTE, RONALD FOWLER, LT. HARRISON, LARRY ALAN COX, R. PIENTKA, SGT. CHILDRESS, T. MCCOY, KEVIN MCCOY, DANNY DAMRON, S. DEEL, L. O'QUINN, PRISON GUARD WHITE, PRISON GUARD WEBB, R. CANTRELL, L. COLLINS, RON ANGELONE, defendants: Pamela Anne Sargent, OFFICE OF THE ATTORNEY GENERAL, RICHMOND, VA.

For T. HAYES, LPN, RN BAKER, L. OWENS, U. NWAUCHE, Medical Doctor, defendants: Heather M. Kofron, WRIGHT, ROBINSON, OSTHIMER & TATUM, David Ernest Boelzner, WRIGHT, ROBINSON, MCCAMMON, OSTHIMER & TATUM, RICHMOND, VA USA.

JUDGES: By: Hon. Jackson L. Kiser, Senior U.S. District Judge.

OPINION BY: Jackson L. Kiser

OPINION: MEMORANDUM OPINION

By: Hon. Jackson L. Kiser

Senior U.S. District Judge

Plaintiff Kevin Johnson, a Virginia inmate proceeding *pro se*, brings this action under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction vested under 28 U.S.C. § 1343. In his complaint, plaintiff alleges that, while incarcerated at Red Onion State Prison (ROSP), his rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution as well as rights found in the constitutional and common laws of the Commonwealth of Virginia were violated, in that he was subjected to supervisory indifference, abuse of governmental authority, conspiratorial abuses, excessive uses of force, deliberate indifference to his serious medical needs, a failure of officials to protect him from known dangers, and unlawful retaliation. Plaintiff names various officials within the Virginia Department of Corrections (VDOC) and at ROSP as defendants. He seeks declaratory, injunctive, and monetary relief.

The defendants,[1] through counsel, have filed a motion to dismiss and a motion for protective order

---

[1] There are two different sets of defendants; the medical defendants (Nurse T. Hayes, Nurse Baker, L. Owens, and Dr. Nwauche), and the non-medical, institutional defendants (Page True, Jerry Armentrout, Yvonne Elswick, C. Yates, Richard Rowlette, Ronald Fowler, Lt. S. Harrison, Larry Alan Cox, R. Pientka, Sgt. G. Childress, T. McCoy, Kevin McCoy, Danny Damron, S. Deel, L. O'Quinn, S. White, J. Webb, R. Cantrell, L. Collins, and Ron Angelone). Both sets of defendants have filed a

against discovery.[2] By order dated August 28, 2000 the court notified the plaintiff of the defendants motion to dismiss as required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and warned plaintiff that judgment might be granted for the defendants if plaintiff did not respond to the motion. Plaintiff has responded, making the matter ripe for the court's consideration. Upon review of the record, the court denies both motions by the defendants and grants plaintiff's October 19, 2000 motion for an extension of time to respond to the medical defendants subsequent motion for summary judgment.

Defendants have moved to dismiss Johnson's complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that this court lacks subject matter jurisdiction over his § 1983 claims because he has not exhausted his administrative remedies in accordance with 42 U.S.C. § 1997e(a) as to "each and every element of each and every claim." Section 1997e(a) of the Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . or any other Federal law, by a prisoner

---

motion to dismiss and, unless otherwise stated, will be referred to collectively as "the defendants."

[2] The original motion to dismiss was filed by the non-medical defendants on August 28, 2000. By motion filed October 2, 2000, the medical defendants incorporated the argument for dismissal by the non-medical defendants and requested a protective order from further discovery by the plaintiff pending resolution of the motion to dismiss. Thus, currently pending are the motions to dismiss based on the memorandum in support of by the non-medical defendants and the motion for a protective order by the medical defendants.

confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). At the outset, it is noted that § 1997e(a) has not been found by the courts of this circuit to impose exhaustion of administrative remedies as a prerequisite to jurisdiction. Thus, the fact that there are claims within the complaint that may not have been exhausted does not deprive this court of subject matter jurisdiction to rule on such claims. *See, for example, Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) (in contrast to statutes that require exhaustion of administrative remedies as a prerequisite to jurisdiction "§ 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. § 1331"). Moreover, the fact that this court routinely reviews cases falling within the ambit of the PLRA, prior to any determination by the court regarding a plaintiff's full exhaustion of a particular claim, should indicate to the defendants that the court does not believe § 1997e(a) acts as a prerequisite to its subject matter jurisdiction.[3] Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be denied.

To the extent that the defendants are challenging the court's jurisdiction over this matter on the basis that the complaint contains both exhausted and unexhausted claims, the motion to dismiss must also be denied. The

---

[3] For example, this court frequently dismisses, *sua sponte*, complaints on the basis that they fail to state a claim upon which relief may be granted or that they are malicious or frivolous, consistent with the PLRA, without first making an initial determination on jurisdiction based on exhaustion.

defendants admit that, as to certain of his claims, Johnson has fully exhausted all available administrative remedies. However, there are other claims within Johnson's complaint that have not been fully exhausted through the VDOC grievance procedure. The defendants contend that because Johnson's complaint contains both exhausted and unexhausted claims, the court has no jurisdiction over this action and, thus, it should be dismissed.

Defendants appear to have relied on *habeas corpus* jurisprudence for their proposition that claims containing both exhausted and unexhausted components must be dismissed in their entirety. *See Rose v. Lundy*, 455 U.S. 509, 510, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982). However, there is "[n]othing in the language or legislative history of the PLRA's amendments to section 1997e(a) [that] supports a 'total' exhaustion requirement." *Cooper v. Garcia*, 55 F.Supp.2d 1090, 1094 (S.D.Ca. 1999). Furthermore, I find that the defendants do not provide a viable reason why the *habeas* total exhaustion analysis of *Rose v. Lundy* should be applied to a § 1983 civil rights action. In fact, "imposing a total exhaustion requirement would appear to contradict Congress' intent in enacting the PLRA," which was to "discourage 'frivolous and abusive prison lawsuits' . . . [A]s a purely practical matter, if the Court were to construe section 1997e(a) as imposing a total exhaustion requirement and dismiss [an] entire action, the prisoner would merely need to file a new suit alleging only his exhausted claims." *Id.* at 1094-95; *see also Jenkins v. Toombs*, 32 F.Supp.2d 955, 959 (W.D.Mich. 1999) (distinguishing § 1983 cases from habeas cases and refusing to apply *Rose v. Lundy's* "mixed" petition rules to § 1997e(a)). Because I have found that the court possesses

proper jurisdiction over this matter and have concluded that jurisdiction is not defeated by the fact that certain of the plaintiff's claims have not been fully exhausted, the motion to dismiss this action for lack of jurisdiction must be denied.

As to any of Johnson's claims which the defendants argue have not been fully exhausted within the meaning of § 1997e(a), Johnson represented to the court in a verified statement that he had in fact exhausted all "available" administrative remedies as to each claim. He alleges, both in his complaint and in his response to the motions to dismiss, that, to the extent some of his claims were not fully prosecuted through the various levels of the grievance procedure, his efforts to so exhaust his administrative remedies were frustrated by prison officials. The defendants assert simply that the Institutional Ombudsman at ROSP, P. Saul, is personally not aware that Johnson has been prevented from accessing the inmate grievance procedure. Section § [sic] 1997e(a) requires that "such administrative remedies as are available [must be] exhausted." The requirement of availability has been construed by the courts of this circuit to mean "accessible," "within one's reach," "at one's disposal." *See Langford v. Couch*, 50 F.Supp.2d 544, 547 (E.D.Va. 1999). Inasmuch as the allegations of the plaintiff and the defendants create a genuine issue of material fact as to whether Johnson exhausted his "available" remedies as to all of his claims, I must deny the motion to dismiss, even as to those aspects of the complaint which have not been fully exhausted within the VDOC grievance procedure.

Even if I were to find that the plaintiff had adequate access to the grievance procedure, as to those unexhausted claims which concern actions occurring more than thirty (30) days ago, dismissal would be inappropriate in that any attempt by Johnson to further exhaust such claims under the Adult Inmate Grievance Procedure would be futile. The defendants acknowledge as much by specifically directing the court's attention to Departmental Operating Procedure 866 (DOP 866). Defendants cite to DOP 866 for the proposition that "grievances are to be filed within thirty (30) calendar days from the date of [an] occurrence or incident." All of the events of which Johnson complains in claims (b), (d), (h), (i), (j), and (k) occurred more than thirty (30) days ago.[4] Defendants do not offer any evidence demonstrating that Johnson's claims fall under any exception to the thirty (30) day limit or that he otherwise has any administrative remedies available to him now regarding the events of which he complains in claims (b), (d), (h), (i), (j), and (k). In fact, the defendants plainly admit that the time limit in which Johnson had to file a regular grievance on these issues has expired. Accordingly, I find that the requirements under § 1997e(a) have been met as to claims (b), (d), (h), (i), (j), and (k), in that Johnson has no remaining available

---

[4] These are the claims the defendants assert are unexhausted and that I find to have occurred more than thirty (30) days ago. The only claim that the defendants contend is unexhausted which may be properly construed as ongoing, such that an effort by Johnson to exhaust would not be futile as per DOP 866 is claim (a). However, as previously noted, that claim, as with all of the unexhausted claims, may go forward in light of Johnson's allegations that his efforts to pursue the grievance procedure were frustrated by prison officials.

remedies to exhaust. Thus, the motion to dismiss as to those claims in particular is denied.

For the foregoing reasons, the defendants' motions to dismiss are denied. Pursuant to the Standing Order of Court entered May 3, 1996, and Rule 83(b) of the Federal Rules of Civil Procedure, the non-medical defendants are directed to file a motion for summary judgment with supporting affidavits. The defendants may again raise the issue of administrative exhaustion in their motion for summary judgment, if they believe that plaintiff's assertions are factually inaccurate.

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to plaintiff and to counsel of record for the defendant(s).

ENTER: This 17th day of November, 2000.

/s/

Jackson L. Kiser

Senior U.S. District Judge

ORDER

By: Hon. Jackson L. Kiser

Senior U.S. District Judge

In accordance with the accompanying memorandum opinion, it is hereby ADJUDGED and ORDERED as follows:

(1) Defendants' motions to dismiss shall be and hereby are DENIED;

(2) Defendants[1] motion for protective order shall be and hereby is DENIED;

(3) The non-medical defendants[2] are hereby DIRECTED to submit within thirty (30) days from the date of entry of this order an answer to plaintiff's claims and any motion for summary judgment, supported by affidavits. If the court receives no additional dispositive motions from the non-medical defendants within the time allotted, the court shall set the case for a jury trial as to such defendants;

(4) Plaintiff's motion for an extension of time within which to respond to the medical defendants motion for summary judgment is GRANTED. The plaintiff shall have a period of twenty (20) days from the date of this order to file his response.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to plaintiff and to counsel of record for the defendant(s).

ENTER: This 17th day of November, 2000.

/s/

Jackson L. Kiser

Senior U.S. District Judge

---

[1] Nurse T. Hayes, Nurse Baker, L. Owens and Dr. Nwauche.

[2] Page True, Jerry Armentrout, Yvonne Elswick, C. Yates, Richard Rowlette, Ronald Fowler, Lt. S. Harrison, Larry Alan Cox, R. Pientka, Sgt. G. Childress, T. McCoy, Kevin McCoy, Danny Damron, S. Deel, L. O'Quinn, S. White, J. Webb, R. Cantrell, L. Collins, and Ron Angelone.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DERWIN OSBOURNE, Plaintiff	)	Civil Action No.: 7:99CV0774
v.	)	**REPORT AND RECOMMENDATION**
WARDEN G. DEEDS, et al., Defendants	)	By: PAMELA MEADE SARGENT United States Magistrate Judge

Plaintiff, Derwin Osbourne, an inmate at Red Onion State Prison in Pound, Virginia ("the Prison"), filed this action for money damages under 42 U.S.C. § 1983 against numerous Commonwealth of Virginia Department of Corrections. ("D.O.C."), officers employed by the Prison. Jurisdiction over this matter is based upon 28 U.S.C. §§ 1331 and 1343. The court previously has dismissed several claims and defendants from this case. The only claims remaining for decision are plaintiff's claim alleging the use of excessive force against him on March 5, 1999, by the defendant Tate and his claim that defendant Counts failed to protect him from Tate's use of excessive force. This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned held an evidentary hearing in this case on January 23, 2001. The plaintiff appeared at this hearing *pro se* by videoconference from the Prison: the defendants were present and represented by counsel. At this hearing, defense counsel moved to bifurcate the proceedings to allow the court to first hear evidence with regard to whether the plaintiff had exhausted his administrative

remedies prior to filing suit as required by 42 U.S.C. § 1997e. The court granted the motion and allowed the parties to first present evidence and argument on the issue of exhaustion of administrative remedies. Based on the evidence presented, the undersigned finds that the plaintiff failed to exhaust his administrative remedies and recommends that the court dismiss his claims.

I. Factual Background

It is undisputed that Osbourne was an inmate at the Prison on March 5, 1999, when defendant Tate fired rubber pellet rounds from a shotgun striking Osbourne and two other inmates while they were in a Prison recreation yard. Osbourne testified that he filed an informal complaint form regarding this incident with the Prison's warden on March 11, 1999. (Plaintiff's Exhibit No. 1.) Osbourne testified that he received a memorandum in response from the warden; this memorandum, which is dated March 12, 1999, instructed him to file his complaint with Major Rowlette, the Prison's Chief of Security. (Plaintiff's Exhibit No. 2.) Osbourne testified that he then submitted this complaint to Major Rowlette. Osbourne further testified that Rowlette returned the form with a written response on the bottom instructing him to file the complaint with the Prison's C building supervisor. Osbourne stated that he then used another complaint form, on which he wrote the same complaint, and that he gave the form to a correctional officer on March 18, 1999, and asked that it be placed in the Prison's internal mail system to be delivered to the C building supervisor. Osbourne does not remember the name of the officer to whom he gave the form. Osbourne testified that he never

received any reply to this complaint and that this complaint form was never returned to him.

Osbourne further testified that on April 5, 1999, he completed a formal grievance form regarding the March 5, 1999, incident and the C building supervisor's failure to respond to his informal complaint. Osbourne stated that he gave this completed grievance form to a correctional officer to be placed in the Prison's internal mail system to be delivered to the Prison's grievance officer. Osbourne does not remember the name of the officer to whom he gave this form. Osbourne testified that he never received any reply to this grievance and it was never returned to him. Osbourne further testified that he never sought any appeal of his April 5, 1999, grievance. Instead, Osbourne testified that, when he received no response to his April 5 grievance, he filed a Notice of Claim with the Virginia General's Office. (Plaintiff's Exhibit No. 3.)

Andrea Fleenor, the Prison's current grievance coordinator, also testified at the January 23, 2001, hearing. Fleenor testified that she had been an employee of the D.O.C. for two years and that she had worked at the Prison for one year. Fleenor stated that she did not work at the Prison in 1999 and, therefore, she had no personal knowledge of the events of March 5, 1999, or of any complaints or grievances Osbourne might have filed in March or April 1999. Fleenor testified that Department Operating Procedure. ("DOP"), 866 sets out the D.O.C.'s inmate grievance procedure. (Defendants' Exhibit No. 3.) She further testified that DOP 866 was in place on March 5, 1999.

Fleenor testified that all of the prison's inmates receive instruction with regard to the inmate grievance procedure in the Inmate Orientation Program upon their arrival. The defendants admitted a copy of a form signed by Osbourne acknowledging that he had received a verbal explanation of the inmate grievance procedure on September 29, 1998. (Defendants' Exhibit No. 2.) Fleenor also stated that a copy of DOP 866 is available for inmate review in the Prison's law library.

Fleenor stated that DOP 866 requires that, prior to submitting a formal grievance, an inmate must submit an informal complaint. DOP 866 also states that the staff member to whom the informal complaint is directed should respond to the complaint within 15 calendar days. Fleenor stated that DOP 866 requires an inmate to file a grievance within 330 calendar days from the date of the incident except under certain prescribed circumstances. Fleenor also stated that DOP 866 requires an inmate to prove that he has sought informal resolution of his complaint by either attaching a copy of his informal complaint to his grievance or by stating the response to his informal complaint on the grievance form. Fleenor testified that under DOP 866, an inmate who does not receive a response to his informal complaint should file a formal grievance within 30 days and note that he did not receive any response to his informal complaint.

DOP 866 requires the prison warden or superintendent to respond to an inmate grievance within 30 days. This initial consideration of an inmate's grievance by the warden or superintendent is referred to as Level I. DOP 866 also provides that an inmate who is dissatisfied with the determination on a grievance at Level I may appeal.

The review that occurs on appeal is referred to as Level II. Under DOP 866, all grievance appealable through at least Level II. Certain specific grievances may be appealed to an additional level. Level III, DOP 866-7.16(4) also states:

> Expiration of a time limit . . . at any stage of the process shall qualify the grievance for appeal to the next level of review.

Fleenor testified that when an inmate grievance is received by her office an employee reviews the grievance to determine whether it meets the criteria for acceptance. If it meets the criteria for acceptance, the grievance is logged into the Adult Grievance Information System. ("AGS"), on the date it is received. The inmate is then issued a receipt showing that the grievance has been accepted. If the grievance does not meet the criteria for acceptance, a copy of the grievance is retained in the inmate's filed and the original grievance is returned to the inmate with an explanation as to why it has been rejected. Fleenor stated that these procedures were in place in April 1999.

Fleenor testified that she had reviewed Osbourne's inmate grievance filed and did not find a copy of any grievance dated April 5, 1999, or any grievance concerning the March 5, 1999, incident. Fleenor also stated that the Prison's records showed that no such grievance was logged as being accepted on or about April 5, 1999. Fleenor stated that the records reflected that Osbourne had filed three other grievances in April 1999, none of which addressed this incident. (Defendants' Exhibit Nos. 4. 5. 6.) Fleenor also testified that the Prison's records reflected that Osbourne had filed 76 different grievances

from March 5, 1999, to August 2000. Fleenor further testified that Osbourne was a frequent filer of grievances and, based on her experience with him, he was well aware of the requirements of the inmate grievance procedures.

Osbourne also testified that he had filed numerous grievances and that he was well aware of the requirements of the inmate grievance procedure.

II. Analysis

The Prison Litigation Reform Act, Pub. L. No. 104-132, amended 42 U.S.C. § 1997e making it mandatory that a prison inmate exhaust his administrative remedies before filing a suit. This section states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C.A. § 1997e(a) (West Supp 2000). Neither the Supreme Court nor the Fourth Circuit has addressed whether this section requires inmates who are seeking only monetary damages to exhaust their administrative remedies in a prison grievance system that does not grant monetary relief. Also, there is a split in authority among the circuits that have considered the issue.[1] Nevertheless,

---

[1] The Seventh and Eleventh Circuit have ruled that inmates seeking only monetary damages must exhaust all available administrative remedies under a prison's inmate grievance system. *See Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532,

both the Eastern and Western Districts of Virginia have ruled that such inmates must exhaust their available administrative remedies before filing suit. *See Taylor v. Barnett*, 105 F.Supp. 2d 483, 486 (E.D. Va. 2000); *Hall v. McCoy*, 89 F.Supp.2d 742, 747-48 (W.D. Va. 2000); *Langford v. Couch*, 50 F.Supp.2d 544, 546-49 (E.D. Va. 1999); *Sallee v. Joyner*, 40 F.Supp.2d 766, 769-72 (E.D. Va. 1999). Furthermore, the Western District has held that claims of use of excessive force are actions "with respect to prison conditions" under § 1983, and, therefore, are subject to the exhaustion requirements of § 1997e(a). *See Hall*, 89 F.Supp.2d at 744-47.

Based upon the above authority, I hold that Osbourne must show that he has exhausted all available administrative remedies before his claims may proceed against the defendants. I further find that Osbourne, by his own admission, did not fully exhaust his administrative remedies prior to filing this action. The undisputed evidence shows that Osbourne is a frequent filer of inmate grievances and is well aware of the requirements of the inmate grievance procedure set out in DOP 866. DOP 866 provides that all inmate grievances are appealable through at least Level II. Under DOP 866, a prison warden or superintendent has 30 days during which to respond to an inmate grievance at Level I. Also, DOP 866-7.16(4) provides that, if an inmate does not receive a

---

535 (7th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998). The Fifth, Ninth and Tenth Circuits have ruled to the contrary. *See Whitley v. Hunt*, 158 F. 3d 882, 887 (5th Cir. 1998); *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997).

response within this 30-day period, his grievance may be appealed to the next level of review. Therefore, even if I assume that Osbourne filed a 5 on April 5, 1999, and that the warden or superintendent never responded to this grievance, Osbourne has not shown that he has exhausted all available administrative remedies in that he admits that he never sought any appeal of this grievance to Level II.

I note that at least two other district courts have reached the same conclusion in similar cases. In *Hernandez v. Steward*, 1996 WL 707015 (D. Kan. November 26, 1996), the court found that a federal prisoner had not exhausted his administrative remedies when he failed to seek an appeal after his complaint was not responded to within the allotted time period. The court noted that the Bureau of Prison's prisoner administrative remedy program specifically provided that an inmate who failed to receive a reply could consider the absence of a response to be a denial at that level, *Hernandez*, 1996 WL 707015 at *2 (citing 28 C.F.R. § 542.18). The court held that an inmate has not fully exhausted his administrative remedies until he has appealed his complaint through all appeal levels. *Hernandez*, 1996 WL 707015 at *1-2 (citing *Irwin v. Hawk*, 40 F.3d 347, 349 n. 2 (11th Cir. 1994), *cert. denied*, 516 U.S. 835 (1995)).

In *Smith v. Stubblefield*, 30 F.Supp.2d 1168 (E.D. Mo. 1998), the court found that a Missouri state prisoner had not exhausted his administrative remedies when he failed to seek an appeal after his grievance was not responded to within the allotted time period. The court noted that the Missouri Department of Corrections' inmate grievance procedure specifically provided that an inmate

could appeal if his grievance was not responded to within the required 30-day period. *Smith,* 30 F.Supp.2d at 1174. The court held that a prisoner must pursue all available levels of administrative remedies in order to satisfy the exhaustion requirement of § 1997e(a), including all appeals. *Smith,* 30 F.Supp.2d at 1174 (citing *White v. McGinnis,* 131 F.3d 593, 595 (6th Cir. 1997)).

I also note that the Eastern District of Virginia has refused to grant a motion to dismiss based on a failure to exhaust administrative remedies in a case in which the plaintiff claimed that he could not appeal his grievance because he had never received any response to it. *See Taylor,* 105 F.Supp.2d at 486. The plaintiff in *Taylor* alleged that DOP 866-7.15(1) required that a Virginia prison inmate must receive a written resolution of his grievance before he could file an appeal to the next level. The court stated simply that, if plaintiff's factual allegations were true, he had exhausted his "available" administrative remedies as required by § 1997e(a), and it denied the motion to dismiss. *Taylor,* 105 F.Supp.2d at 486. The court did not address whether the plaintiff's allegations as to the contents of DOP 866 were correct. Having reviewed DOP 866, I find no such provision in 866-7.15(1) or elsewhere. To the contrary, DOP 866-7.16(4) states that expiration of a time limit at any stage of the process qualifies the grievance for appeal to the next level.

Based upon the above-stated reasons, I find that Osbourne did not fully exhaust his available administrative remedies in that he did not seek an appeal of his grievance when he did not receive a timely response.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. DOP 866 provides for at least two levels of review for all inmate grievances;

2. DOP 866 provides that an inmate who does not receive a timely response to his grievance at any stage may appeal his grievance to the next level; and

3. Assuming Osbourne filed a grievance on April 5, 1999, regarding this incident, he did not fully exhaust his administrative remedies prior to filing suit in that he did not seek any appeal of this grievance.

RECOMMENDED DISPOSITION

Based on the above-stated reasons. I recommend that the court find that the plaintiff did not exhaust his administrative remedies prior to filing this action. Therefore, I recommend that the court dismiss the plaintiff's claims against the defendants without prejudice.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C) (1993):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such

> proposed findings and recommendations as provided by rules of court. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence to recommit the matter to the magistrate [judge] with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period the Clerk is directed to transmit the record in this matter to the Honorable Jackson L. Kiser, Senior United States District Judge.

The clerk is directed to send copies of this Report and Recommendation to all counsel of record and unrepresented parties at this time.

DATED: January 24, 2001.

/s/ Pamela Meade Sargent
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES D. BIRTH,

Plaintiff,

RED ONION STATE PRISON, *et al.*,

Defendant(s).

Civil Action No. 7:00-CV-00006

By: **Hon. James C. Turk**
U.S. District Judge

FINAL ORDER

(Filed Feb. 1, 2000)

By Order entered January 5, 2000, plaintiff was directed to execute a verified statement demonstrating that he has exhausted his administrative remedies, or that such remedies do not exist at his present place of confinement. *See* 42 U.S.C. §1997e(a). Plaintiff was advised that failure to return the verified statement within twenty (20) days would result in dismissal of this action without prejudice. More than twenty (20) days has elapsed, and the plaintiff has failed to return the verified statement to the Court. Plaintiff has requested an extension of time, specifically 70 additional days, in which to exhaust his remedies and return a verified statement to the court indicating that he has done so. The court does not find such a lengthy extension of time to be warranted by the situation, especially since exhaustion of administrative remedies is a *filing* requirement. *See* §1997e. Accordingly, it is hereby

ORDERED

that plaintiff's motion for extension is hereby denied and this case shall be and hereby is dismissed without prejudice and stricken from the active docket of this Court. Plaintiff may refile his claims in a separate action once he has exhausted his available administrative remedies.

The Clerk is directed to send certified copies of this Order to all parties.

ENTER: This 16th day of February, 2000.

/s/ James C. Turk
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROOSEVELT POARCHE,
Plaintiff,

MRS. WILLIS, *et al.*,
Defendant(s).

Civil Action No.
7:00-cv-00420

By: **Hon. James C. Turk**
U.S. District Judge

FINAL ORDER

(Filed Jun. 16, 2000)

By Order entered May 31, 2000, plaintiff was directed to execute a verified statement and documentation demonstrating that he has exhausted his administrative remedies as to each of the claims raised in his complaint, or that such remedies do not exist at his present place of confinement. *See* 42 U.S.C. §1997e(a). Plaintiff was advised that failure to return the verified statement and supporting documentation within twenty (20) days would result in dismissal of this action without prejudice. The plaintiff has filed the necessary financial information and the verified statement. However, from the supporting documentation he submits with his statement, it is clear that he has not, in fact, exhausted his administrative remedies. He does not allege or offer documentation demonstrating that he has appealed any regular grievance concerning his claims to the Regional Administrator or any higher level of the grievance procedure. Writing letters to administrative officers does not satisfy the exhaustion requirement. Plaintiff must comply, or document his attempts to comply with the regular grievance

procedures by filing an informal complaint, then a regular grievance, and then as many appeals as are available on his claim. As plaintiff has clearly not met this requirement, he has thus failed to show exhaustion of his remedies. Accordingly, the court cannot file the action, and it is hereby

ORDERED

that this case shall be and hereby is dismissed without prejudice and stricken from the active docket of this Court. Plaintiff may refile his claims in a separate action once he has exhausted and documented his available administrative remedies.

The Clerk is directed to send certified copies of this Order to all parties

ENTER: This 15th day of ~~April~~ June, 2000.

/s/ James C. Turk
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ALBERT EARL JONES,
Plaintiff,

v.

MAIL ROOM STAFF, *et al.*,
Defendant.

Civil Action No.
7:00-CV-000142

ORDER

(Filed Feb. 24, 2000)

By: Jackson L. Kiser
Senior U.S. District Judge

Plaintiff Albert Earl Jones, has filed this *pro se* civil action pursuant to 42 U.S.C. §1983, with jurisdiction vested pursuant to 28 U.S.C. §1343. In the complaint, plaintiff concedes that he has not exhausted all available administrative remedies in accordance with 42 U.S.C. §1997e(a). Accordingly, it is hereby

ORDERED

that this case shall be and hereby is **FILED** and **DISMISSED** without prejudice. This case will be stricken from the active docket of this court.

The Clerk of the Court is directed to send a certified copy of this Order to plaintiff.

ENTER: This 24th day of February, 2000.

/s/ Jackson L. Kiser
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CHRISTOPHER DOZIER,

Plaintiff,

DEPARTMENT OF CORR., *et al.*,

Defendant(s).

Civil Action No. 7:99-CV-0094

By: Hon. James C. Turk
U.S. District Judge

FINAL ORDER

(Filed Mar. 10, 1999)

By Order entered February 11, 1999, plaintiff was directed to execute a verified statement demonstrating that he has exhausted his administrative remedies, or that such remedies do not exist at his present place of confinement. *See* 42 U.S.C. §1997e(a). Plaintiff was advised that failure to return the verified statement within twenty (20) days would result in dismissal of this action without prejudice. The twenty (20) days has elapsed. Plaintiff did return a copy of a grievance that he filed about his alleged need for medical treatment. However, officials returned the grievance because plaintiff had failed to explain on the grievance any of the informal attempts he had made to resolve the matter. Plaintiff does not indicate that he filed a new grievance, explaining the informal steps he has allegedly taken, nor does he indicate that he has appealed to a higher level within the grievance procedures. Therefore, the court finds that he has not yet exhausted his administrative remedies as required for filing a prisoner civil action, pursuant to §1997e. Accordingly, it is hereby

ORDERED

that this case shall be and hereby is dismissed without prejudice and stricken from the active docket of this Court. Plaintiff may refile his claims in a separate action once he has exhausted his available administrative remedies. The Clerk is directed to send certified copies of this Order to all parties.

ENTER: This 10th day of March, 1999.

/s/ James C. Turk
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CHRISTOPHER L. DOZIER,

Plaintiff,

v.

CHATHAM CORRECTIONAL UNIT #15, *et al.*,

Defendant.

Civil Action No. 7:99-CV-0142

ORDER
(Filed April 9, 1999)

By: Hon. James C. Turk
United States District Judge

Plaintiff Christopher L. Dozier, has filed this *pro se* civil action pursuant to 42 U.S.C. §1983, with jurisdiction vested pursuant to 28 U.S.C. §1343. By order dated March 9, 1999, the court directed plaintiff to submit an inmate account report and to execute a verified statement demonstrating that he had exhausted all available administrative remedies. *See* 28 U.S.C. §1915(a); 42 U.S.C. §1997e(a). Plaintiff was advised that failure to do either of the foregoing within twenty (20) days would result in dismissal of the complaint without prejudice. Plaintiff has failed to submit a completed inmate account report, and, although plaintiff affirms under penalty of perjury that he has exhausted all administrative remedies, the documentation offered in support of this affirmance indicates that he never proceeded past the first stage of the grievance procedure.[1] Inasmuch as more than twenty days

[1] The court also notes that plaintiff has failed to amend his complaint as directed.

have elapsed and plaintiff has not yet complied with the conditional filing order, it is hereby

ORDERED

that this case shall be and hereby is **DISMISSED** without prejudice and that this case be and hereby is **STRICKEN** from the active docket of this court.

The Clerk of the Court is directed to send a certified copy of this Order to plaintiff.

ENTER: This 8th day of April, 1999.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDDIE P. SIZEMORE,

Plaintiff,

v.

DR. CARBONE, et al.,

Defendant(s).

Civil Action No.
7:99-cv-0014

By: Hon. James C. Turk
U.S. District Judge

FINAL ORDER

(Filed Mar. 5, 1999)

By Order entered 01-12-99, the Court directed plaintiff to execute a verified statement demonstrating that he has exhausted his administrative remedies, or that such remedies do not exist at his present place of confinement. *See* 42 U.S.C. §1997e(a). The Court also ordered that a filing fee be assessed in the amount of **$150.00** and granted plaintiff twenty (20) days from the date of the Order to forward to the Court a statement of his assets and information regarding his trust account for the six (6) months preceding the filing of this action so that the Court could determine a payment schedule. Plaintiff was advised that failure to return the verified statement, the statement of assets, and/or the inmate account statement within twenty (20) days would result in dismissal of this action without prejudice. More than twenty (20) days has elapsed, and the plaintiff has failed to return either the verified statement or the required financial documents to the Court. Accordingly, it is hereby

ORDERED

that this case shall be and hereby is dismissed without prejudice and stricken from the active docket of this Court. Plaintiff may refile his claims in a separate action once he exhausts his available administrative remedies and also signs and returns the necessary financial forms to allow the Court to begin the process of withholding of filing fees in his case.

The Clerk is directed to send certified copies of this Order to all parties.

ENTER: This 4th day of March, 1999.

/s/ James C. Turk
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

TERRY HARRIS,

Plaintiff,

v. CASE NO. 2:00cv116

DR. KING,
NURSE WEIGHCAMP,
NURSE AUSTION, AND
LT. MEADE,

Defendants,

JUDGMENT IN A CIVIL CASE

(Filed Dec. 20, 2000)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by the Court.** This action came for decision by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendants' Motions to Dismiss are **GRANTED.**

DATED:
December 20, 2000

NORMAN H. MEYER, JR.,
CLERK

By M. J. Cowart
M. J. Cowart, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TERRY HARRIS,

Plaintiff,

v. ACTION NO. 2:00cv116

DR. KING,
NURSE WEIGHCAMP,
NURSE AUSTION, and
LT. MEADE,

Defendants.

OPINION AND FINAL ORDER

(Filed Dec. 20, 2000)

Plaintiff, a state prisoner, brought this *pro se* action, pursuant to 42 U.S.C. § 1983. Plaintiff claims that his constitutional rights were violated during his incarceration at the Haynesville Correctional Center, Haynesville, Virginia. Specifically, he asserts that defendants denied him adequate medical care.

I. Procedural History

Plaintiff's complaint was conditionally filed on February 22, 2000. By order dated June 16, 2000, the court waived the initial partial filing fee, ordered this action filed, and directed plaintiff to submit proof of his exhaustion of administrative remedies. On July 10, 2000, plaintiff submitted to the court numerous documents related to his use of the administrative grievance procedure. Upon initial review of these documents, the court concluded

that plaintiff showed sufficient proof of his exhaustion of administrative remedies, based upon plaintiff's submission of a Level II grievance response.

On August 24, 2000 defendant Meade filed a motion to dismiss plaintiff's complaint on the grounds that plaintiff failed to exhaust his administrative remedies. On September 15, 2000 defendants King, Austion, and Weighcamp also filed a motion to dismiss. In accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), plaintiff was given an opportunity to respond to defendant's motions to dismiss with any material that he wished to offer in rebuttal. Plaintiff was also instructed that failure to submit any materials could result in an adverse judgment based on defendants' motions and accompanying affidavits. Plaintiff did not respond to either motion. For the reasons set out below, the Court **GRANTS** Defendant's Motions to Dismiss.

II. Facts

In his complaint, plaintiff, a diabetic, claims that 1) defendant King removed a corn from his left great toe, which later became severely infected, and which is still infected; 2) defendant Weighcamp[1] administered plaintiff a medication which plaintiff's medical file stated he was allergic to, and which resulted in an allergic reaction; 3) defendant Austion gave him an incorrect insulin dosage;

---

[1] It appears that the correct spellings of defendants' names are "Wegkamp" as opposed to "Weighcamp" and "Austin" as opposed to "Austion"; however, defendants have not made a motion to change the caption of this action.

and 4) defendant Meade refused to give him his dinner in a timely manner after plaintiff had taken his insulin.

III. Analysis

No action may be brought with respect to prison conditions under 42 U.S.C. § 1983 by a prisoner until the prisoner has exhausted all administrative remedies as are available to him. *See* 42 U.S.C. § 1997e(a) (as amended by Pub L No 104-134, 110 Stat. 1321). A court may dismiss claims which have not been fully exhausted, regardless of the relief sought and regardless of whether the requested relief was fully available. *Salee v. Joyner*, 40 F.Supp.2d 766 (E.D. Va. 1999).

In response to this court's order dated June 16, 2000 ordering plaintiff to produce proof of exhaustion of administrative remedies, plaintiff submitted several documents. However, upon further consideration of these documents, it is clear that plaintiff's Level II grievance response does not pertain to the claims in this case. In grieving his first claim, plaintiff filed three complaint forms and one regular grievance, which he did not appeal. Plaintiff filed only an informal grievance regarding his second claim. He did not grieve his third claim at all. Plaintiff filed a Level I grievance regarding his fourth claim, which was deemed founded. He did not file a Level II appeal for this claim, however. Plaintiff did submit documentation of a Level II appeal; however, the issue in that particular complaint was unrelated to the complaint now before the court.[2] Accordingly, the court

---

[2] The Level II grievance which plaintiff filed on November 11, 1999 was in reference to plaintiff's request that he be

FINDS that plaintiff has failed to exhaust his administrative remedies.

IV. Conclusion

Plaintiff had not completed the administrative remedies available at Haynesville Correctional Center prior to filing this action,. Accordingly, Defendants' Motions to Dismiss for failure exhaust administrative remedies are **GRANTED**. This action is **ORDERED DISMISSED** without prejudice to plaintiff's right to refile once he has exhausted his administrative remedies.

The plaintiff is advised that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

The Clerk is **DIRECTED** to send a copy of this Order to Plaintiff and counsel for Defendants.

IT IS SO **ORDERED**.

/s/ Rebecca Beach Smith
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia
December 20, 2000

---

transferred to another institution which could better meet his medical needs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MUSTAMANDI, *et al.*,	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	NO. 99-1385-AM
F.W. GREENE, *et al.*,	)	
Defendants.	)	

ORDER

(Filed May 19, 2000)

Plaintiff, Virginia inmates, filed this action under 42 U.S.C. § 1983 *pro se* alleging that defendants violated their First Amendment right to free exercise of religion, and their Fourteenth Amendment right to Equal Protection while they were incarcerated at Mecklenburg Correctional Center ("MCC"). Named as defendants are MCC Warden F.W. Green and MCC Assistant Warden/Programs C.K. Hester. On March 15, 2000, plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction to enjoin defendants from continuing to violate their rights. Defendants have responded to this Motion and have filed a Motion to Dismiss on the grounds that plaintiffs have failed to exhaust their administrative remedies. Plaintiffs were notified of this Motion and given the opportunity to respond, although they have not done so. This matter therefore is ripe for disposition. For the reasons that follow, plaintiffs' Motion

for Temporary Restraining Order and Preliminary Injunction must be denied, defendants' Motion to Dismiss must be granted and this action must be dismissed.

In their amended complaint, supplemental facts, and Motion for Temporary Restraining Order and Preliminary Injunction, plaintiffs allege that defendants have interfered with their right to practice the Muslim religion in the following ways. They state that defendants serve pork, which is forbidden by their religion, in the cafeteria without identifying it as pork or providing a substitute. They allege that defendants arbitrarily prohibited certain Muslims from attending Friday prayer services. They further allege that defendants interfered with Muslims' ability to observe Ramadan by not providing meals during the times permitted by their faith. Plaintiffs state that defendants have forbidden Muslim inmates to hold Koranic study sessions but allow Christians to hold bible study sessions.

Plaintiffs have included several grievance forms indicating that defendant Price utilized institutional procedures to complain about the time of Ramadan meals and the fact that the inmates could not eat their Ramadan meals together. However, plaintiffs have provided no information indicating that these grievances were appealed. Nor is there any indication other than their bare assertion on their complaint that plaintiffs' other claims were developed through the grievance process. Moreover, there is no indication that each named plaintiff has exhausted his administrative remedies.

Because plaintiffs have failed to exhaust the state administrative remedies available to them, this court does

not have jurisdiction to review the complaint. Accordingly, this action must be dismissed without prejudice, pursuant to 42 U.S.C. § 1997e(a), which states that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or another Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." In order to bring this action in the federal courts, plaintiff must comply with the prison grievance procedure. If the response he receives is unsatisfactory, plaintiff must pursue his grievance through all available levels of appeal before presenting that claim in federal court.

Accordingly, it is hereby **ORDERED** that:

1. Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is **DENIED**;

2. Defendants's Motion to Dismiss is **GRANTED**;

3. This action is **DISMISSED** without prejudice;

4. Plaintiffs are **ADVISED** that each plaintiff may submit his claims to this Court only after he personally has exhausted all administrative remedies with regard to each claim; and

5. Plaintiffs further are **ADVISED** that should they resubmit their claims to this Court, they must do so in full compliance with Rule 8 of the Federal Rules of Civil Procedure.

Should plaintiffs wish to appeal, notice of appeal must be filed with the Clerk of this Court no later than thirty (30) days of the date of this Order.

The Clerk is DIRECTED to send a copy of this order to plaintiffs and to counsel for defendants.

Date: May 19, 2000
Alexandria, Virginia

/s/ Claude M. Hilton
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SAMUEL RICHARD RHODES,

Plaintiff,

v. CIVIL ACTION **3:00cv333**

GENE M. JOHNSON, *et al.*,

Defendants.

ORDER

(Filed Jul. 10, 2001)

In accordance with the accompanying Memorandum Opinion it is ORDERED that the Defendants' motion to dismiss and renewed motion to dismiss are denied.

Let the Clerk send a copy of the Order to Rhodes and counsel of record.

And it is so ORDERED.

/s/ Robert E. Payne
UNITED STATES DISTRICT JUDGE

Richmond, Virginia
Date: July 10, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SAMUEL RICHARD RHODES,
Plaintiff,

CIVIL ACTION
3:00cv333

v.

GENE M. JOHNSON, *et al.*,
Defendants.

MEMORANDUM OPINION

(Filed July 10, 2001)

Samuel Richard Rhodes, an inmate confined within the Virginia Department of Corrections ("VDOC"), filed this action under 42 U.S.C. § 1983 alleging violations of the First and Fourteenth Amendments to the Constitution of the United States. Rhodes was removed from his prison job and placed in segregation for violating VDOC grooming regulations promulgated in November of 1999. Johnson, Wallace, and Townsend, (collectively "the Defendants") have moved to dismiss on the grounds that: (1) the Court lacks jurisdiction to entertain Rhodes' complaint because he has not exhausted his administrative remedies for his claims, *see* 28 U.S.C. § 1997e(a); and (2) that the action is barred because Rhodes has not suffered a physical injury. Rhodes has responded. Jurisdiction is appropriate pursuant to 28 U.S.C. § 1343(a)(3).

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

As part of the Prison Litigation Reform Act of 1995, Congress required that before filing a civil action, an inmate must exhaust the administrative remedies, if any, available to him under the rules of the prison system in which he is confined. Specifically, the pertinent statute now provides that:

> *No action shall be brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until* such *administrative remedies as are available are exhausted.*

42 U.S.C. § 1997e(a) (emphasis added). The Defendants assert that Rhodes did not properly exhaust the administrative remedies for the redress of the claims addressed to the grooming regulations and the punishment assessed against Rhodes for failing to abide by them. Specifically, the Defendants contend that Rhodes failed to file, within the time required, administrative grievances for every facet of his current claims, and that the failure deprives this Court of jurisdiction to entertain Rhodes' entire complaint under 42 U.S.C. § 1997e(a).

The well-reasoned decision of Judge Kiser in *Johnson v. True*, 125 F.Supp. 2d 186 (W.D. Va. 2000) (rejecting identical arguments by VDOC defendants), fully and accurately addresses the flaws in the Defendants' position.[1] First, the text of § 1997e(a) does not suggest that

---

[1] Having rejected the legal predicate upon which the Defendants' motion to dismiss is based, it is unnecessary to

Congress intended to deprive the district courts of subject matter jurisdiction over prison complaints containing unexhausted claims. *See id.* at 186 (citing *Underwood v. Wilson*, 151 F.3d 292, 294-95 (5th Cir. 1998). Further support for that view is found in 42 U.S.C. § 1997e(c)(1) & (2) which require the district courts to screen prisoner complaints and dismiss those that are frivolous or malicious and those that fail to state a claim or seek monetary relief from a defendant who is immune from such relief. *See* 42 U.S.C. § 1997e(c)(1). The statute provides that the court may dismiss such claims without requiring the exhaustion of administrative remedies. *See* 42 U.S.C. § 1997e(2). "The court would not be empowered to do so if the exhaustion provision deprived the court of jurisdiction over the action." *Underwood*, 151 F.3d at 295. Thus, while exhaustion is not a jurisdictional prerequisite, it is a valuable defense which the Court must address when properly invoked by the prison officials. *See Perez v. Wisconsin Department of Corrections*, 182 F.3d 532, 536 (7th Cir. 1999) (Easterbrook, J.) (concluding § 1997e(a) is similar to a statute of limitations). accordingly, the Defendants' assertion that the presence of an unexhausted claim deprives this Court of jurisdiction to entertain the action is rejected.

Defendants next argue that the comity principles that require the complete exhaustion of claims as a prerequisite for relief under the habeas corpus statute, 28 U.S.C. § 2254, also should control the ability of the district courts to entertain a claim under 42 U.S.C. § 1983 by a state

---

address the parties' dispute regarding what remedies Rhodes pursued and the impact of those efforts under § 1997e(a).

inmate challenging the conditions of his confinement. Both Congress and the Supreme Court have refused to engraft the rigid exhaustion requirements for habeas actions onto § 1983 claims and this Court declines to do so here. *See Edwards v. Balisok*, 520 U.S. 641, 649 (1995); *Strader v. Troy*, 571 F.2d 1263, 1269 (4th Cir. 1978); *Johnson v. True*, 125 F.Supp. 2d 186, 189 (W.D. Va. 2000); *Jenkins v. Toombs*, 32 F.Supp.2d 955, 959 (W.D. Mich. 1999) (distinguishing 1983 cases from habeas cases and refusing to apply *Rose v. Lundy's* mixed petition rules to 1997e(a)).

That leaves for discussion the issue of whether any of Rhodes' present claims must be dismissed because he failed to pursue his administrative remedies within the allotted time. The pertinent VDOC regulations require that before submitting a formal grievance, the inmate must make a good faith effort to resolve the grievance informally through the processes, practices, or procedures available at the institution to inmates to secure institutional services or resolve complaints. *See* Virginia Department of Corrections Operating Procedure ("VDCOP") 866-7.13. If that resolution effort fails, the inmate must initiate a formal grievance by filling out a standard form. *See id.* at 866-7.14. A formal grievance must be filed within thirty days from the date of the incident or occurrence, or the discovery of the incident or occurrence, except in instances beyond the inmate's control. *See id.* at 866-7.13.

The Defendants acknowledge that, on March 7, 2000, Rhodes field a formal grievance wherein he alleged the Defendants had discriminated against him in violation of the Fourteenth Amendment by forcing him to cut his hair and by subsequently removing him from his job. The

Defendants further acknowledge that they addressed Rhodes' grievance, as well as the appeals from that decision, on the merits of the grievances. Nevertheless, the Defendants contend that under the thirty-day limit set forth in VDCOP 866-7.13, Rhodes should have filed his formal grievance earlier. The Defendants conclude that Rhodes' tardiness constitutes a failure to comply with 42 U.S.C. § 1997e(a), which requires dismissal of all of his claims with prejudice. The argument fails because, under the only authority cited for this proposition, *Marsh v. Jones*, 53 F.3d 707, 710 (5th Cir. 1995), dismissal would not be warranted.

In *Marsh*, the Fifth Circuit concluded that under the pre-PLRA version of § 1997e(a), the courts have the power to dismiss with prejudice an inmate's claims for failure to exhaust administrative remedies "even when administrative relief is time-barred or otherwise precluded." *Id.* While the Defendants place great weight on this conclusion, they ignore the Fifth Circuit's admonitions regarding the exercise of that power. *See id.* For example, "if an inmate fails to meet filing deadlines under an administrative scheme, a court has ample discretion to determine that exhaustion nonetheless should be forgone." *Id.* at 710 n. 7 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992)). The Fifth Circuit went on to note that a court should not dismiss a claim with prejudice for failure to exhaust administrative remedies: (1) if such dismissal would be inappropriate or contrary to the interests of justice; (2) if the inmate has made a good faith attempt to exhaust his administrative remedies; or (3) if the administrative grievance procedures do not meet certain minimum standards. *See Marsh*, 53 F.3d at 710.

Here, Rhodes made a good faith effort to exhaust his administrative remedies. Rhodes filed a grievance and pursued all available levels of appeal for his complaint that the defendants discriminated against him by requiring him to cut his hair and removing him from his job for his failure to obey that requirement. The Defendants insist that Rhodes has never filed a grievance regarding his placement in segregation for failing to cut his hair. However, the regulations submitted by the Defendants indicate that disciplinary matters such as placement in segregation are non-grieveable. *See* VDCOP 866-7.11. Thus, the record before the Court reflects that Rhodes has filed a grievance and pursued all available levels of appeal for all of his present claims. *See Camp v. Brennan*, 219 F.3d 279, 281 (3d Cir. 2000) (concluding that § 1997e(a) is satisfied when inmate's allegations have been examined on the merits by ultimate administrative authority).

Finally, the Defendants suggest that the recent decision in *Booth v. Churner*, 121 S. Ct. 1819 (2001), requires the dismissal of Rhodes' claim with prejudice. In *Booth*, the inmate asserted that he was not required to exhaust his administrative remedies because the prison grievance system could not provide him with the monetary relief he sought. *Id.* at 1822. The Court rejected the argument holding that "[w]e will not read futility or other exhaustion requirements into a statute where Congress has provided otherwise. . . . Congress has provided in § 1997e(a) that an inmate must exhaust [administrative remedies,] irrespective of the forms of relief sought and offered through the administrative avenues." *Id.* at 1825, n. 6.

The Defendants fail to explain and the Court fails to discern the import of *Booth* to their argument that Rhodes' tardiness in pursuing administrative remedies warrants the dismissal of the action. Unlike the inmate in *Booth*, Rhodes does not claim that it is futile for him to pursue administrative redress of his claims. Rather, he asserts, and the record reflects, that he has pursued all available remedies for all of his claims.

Accordingly, the motion to dismiss on the grounds that Rhodes has failed to exhaust his available administrative remedies will be denied.

II. IMPACT OF 42 U.S.C. § 1997e(e)

The Defendants contend that "this complaint is barred by 42 U.S.C. § 1997e(e) since Rhodes has not suffered any actual injury." Section 1997e(e) provides:

> LIMITATION ON RECOVERY: No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Rhodes has not demonstrated that he has sustained a physical injury. However, the foregoing provision targets actions for compensatory damages for emotional suffering and has no restrictive effect on Rhodes' claims for declaratory or injunctive relief. *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C.Cir. 1998). Thus, while Rhodes is not entitled to recover damages for emotional harm, he is free to litigate his demands for injunctive relief, declaratory relief, and any special damages. *See*

Dawes v. Walker, 239 F.3d 489, 496 (2d Cir. 2001). The Defendants' motion to dismiss will be denied.

Let the Clerk send a copy of the Memorandum Opinion to counsel of record and Rhodes.

And it is so Ordered.

/s/ Robert E. Payne
UNITED STATES
DISTRICT JUDGE

Richmond, Virginia
Date: July 10, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FRANCIS J. WAWRZYNIAK,

Plaintiff,

v.

ACTION NO.
2:99cv1680

SGT. FOWLKES, SGT. JONES, SGT. HARRELL, LT. WYCHE, SGT. BRAGG, OFFICER MCGLONE, OFFICER WEST, OFFICER WELLS, and WARDEN JOHN B. TAYLOR,

Defendants.

OPINION AND DISMISSAL ORDER

Plaintiff, a Virginia inmate, brings this *pro se* action pursuant to 42 U.S.C. § 1983, to address alleged violations of his constitutional rights. Specifically, Plaintiff alleges that defendants used excessive force against him and denied him medical care in violation of the Eighth Amendment of the U.S. Constitution while he was an inmate at Sussex I State Prison. Plaintiff seeks $500,000 in damages. Defendants have filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that plaintiff has failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Defendants have also filed a Motion for Summary Judgment. For the reasons explained below, this action is dismissed pursuant to 42 U.S.C. § 1997e(a) based on plaintiff's failure to exhaust the administrative remedies available to him.

Procedural History

Plaintiff filed this action on August 26, 1999 in the U.S. District Court for the Western District of Virginia, Roanoke Division. The action was transferred to this court on August 30, 1999.

On April 26, 2000, Defendants filed a Motion to Dismiss pursuant to FRCP 12(b)(1). On January 19, 2001, the court directed defendants to answer interrogatories to enable the court to rule on defendants' motion. The court on March 27, 2001 denied defendants' Motion to Dismiss for lack of subject matter jurisdiction.

Defendants have now filed a Motion to Dismiss pursuant to FRCP 12(b)(6) and Motion for Summary Judgment. In accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), plaintiff was given an opportunity to oppose these motions, and plaintiff responded on May 14, 2000. Therefore, this matter is ready for judicial determination. For the reasons set out below, the Court **GRANTS** defendants' Motion to Dismiss.

Facts

In his complaint, plaintiff claims that at approximately 6:30 a.m. on April 24, 1999, while he was an inmate at Sussex I State Prison, defendant McGlone verbally assaulted and threatened him. Defendant McGlone also told plaintiff to put his shirt on, as plaintiff's tattoos, which defendant McGlone found offensive, were visible. Defendant McGlone then canceled plaintiff's recreation time and placed him in handcuffs. He was taken to a shower and ordered to remove his clothes. Plaintiff

alleges that defendant Fowlkes approached him with a billy club and stun gun. Plaintiff was then ordered to remove a shirt he had around his waist. Plaintiff refused.

Defendant Fowlkes ordered him to go his room, and poked him in the back. Defendant Fowlkes then ordered officer Smalls and defendant McGlone to take all of plaintiff's clothing and bed linen.

Defendant Fowlkes then again ordered plaintiff to give him the shirt plaintiff held around his waist. As defendant McGlone attempted to take plaintiff's shirt, plaintiff resisted. Plaintiff alleges that defendant Fowlkes then began striking him repeatedly in the left arm, chest, and stomach with a billy club and shocking him with a taser. Plaintiff claims he had visible injuries, and that he asked defendant Fowlkes whether he could see someone in medical. He alleges that defendant Fowlkes told him he could not.

Plaintiff claims he submitted an emergency grievance form at 9:50 a.m. to defendant West and showed defendant West his injuries. Defendant West acknowledged plaintiff's injuries and told plaintiff he would give the grievance to Sgt. Maro on the medical staff. Plaintiff did not see medical during that shift, and says he received no response to his emergency grievance.

After the required eight hours had expired, plaintiff filed another emergency grievance. Defendant Wells took his grievance at 6:58 p.m. and told plaintiff that he had given it to defendant Harrell. He received no reply to this emergency grievance.

At 10:30 p.m. plaintiff asked officer Blythe for an emergency grievance and explained what had happened. Officer Blythe instructed plaintiff to file an emergency grievance, which plaintiff did at 1:15 a.m. on April 25, 1999, eight hours after his last emergency grievance was filed. Plaintiff submitted a copy of this emergency grievance form which had been answered at 2:00 a.m. with the finding that plaintiff's grievance did not meet the definition of an emergency.

Between 2:00 a.m. and 2:30 a.m. defendant Jones asked plaintiff what was wrong, and told plaintiff he would notify the nurse. At approximately 6:00 a.m. Blythe returned plaintiff's emergency grievance, stating that it was not an emergency. Plaintiff saw no one from medical.

Plaintiff then filed a complaint form and a regular grievance and received no responses. On or around April 27, 1999 plaintiff told a new sergeant that he still had seen no one from medical. She informed defendant Bragg of this, who told plaintiff "I find that hard to believe." Defendant Bragg then inspected plaintiff's arm, and told plaintiff he should write a complaint to the investigator, which he did. She did not have medical see plaintiff.

After receiving no response from the investigator, plaintiff wrote to the warden. On April 29 plaintiff received a letter from the warden, defendant Taylor, telling plaintiff that his letter was being forwarded to the investigator's office. The investigator interviewed plaintiff on May 5, 1999, and which time he was taken to see the doctor. Plaintiff claims the investigator requested x-rays of plaintiff's arm, however x-rays were not taken.

On May 17, 1999, prior to completing the grievance process, plaintiff was transferred to Red Onion State Prison.

Analysis

No action may be brought with respect to prison conditions under 42 U.S.C. § 1983 by a prisoner until the prisoner has exhausted all administrative remedies as are available to him. *See* 42 U.S.C. § 1997e(a) (as amended by Pub. L. No 104-134, 110 Stat. 1321). The United States Supreme Court has recently examined the extent of the exhaustion requirement § 1997e(a). The Court found that Congress had mandated exhaustion regardless of whether the relief sought was available through the grievance procedure. *See Booth v. Churner*, ___U.S.___, 121 S.Ct. 1819, 2001 WL 567712 (2001).

Plaintiff admits that he did not follow the standard grievance procedures set forth by the Virginia Department of Corrections. Plaintiff appears to be arguing, however, that 1) he was transferred prior to being able to complete the grievance procedures and 2) because the correctional facility had instituted an internal affairs investigation [sic] his case, he should not be required to further exhaust his administrative remedies.

The actions of which plaintiff complains took place on April 24, 1999. Plaintiff was transferred to Red Onion State Prison on May 17, 1999. Plaintiff has 30 days after the incident of which he complains to file a regular grievance form. *See* Virginia DOP 866-7.14. Plaintiff did not complete the grievance process prior to being transferred to Red Onion State Prison. Plaintiff was transferred before the 30-day period expired; however, because he

was transferred within the state prison system, he still had administrative remedies available to him. Plaintiff would have been permitted to exhaust his administrative remedies from the facility to which he was transferred. *See* DOP 866-7.14 and Saul Aff. ¶ 5. Further, although plaintiff complains that defendants failed to respond to his grievances before the response time had expired, DOP 866-7.16 specifically provides that "Expiration of a time limit . . . at any stage of the process shall qualify the grievance for appeal to the next level of review . . . " did not attempt to exhaust his administrative remedies after he was transferred to another facility within the state prison system.

Plaintiff also states that an institutional investigation was ongoing into his complaint. Institutional investigations, however, do not satisfy the grievance requirements. DOP 866 requires that an inmate file an informal grievance, a regular grievance, a Level I appeal, a Level II appeal, and, if the grievance challenges the substance or interpretation of division procedures, a Level III appeal. The Supreme Court in *Booth* made it clear that exceptions will not be read into the statutory exhaustion requirement where Congress has provided otherwise. *See Booth* 121 S.Ct. at ___, note 6. Congress clearly mandated the exhaustion of available remedies and made no provision for alternate methods of exhaustion where a system of administrative remedies are already available.

Section 1997e(a) requires that a prisoner exhaust "such administrative remedies as are available . . . " Plaintiff had administrative remedies available to him both while at Sussex I State Prison and after he had been transferred to Red Onion State Prison, and he did not

avail himself of these available remedies. In order to exhaust his administrative remedies, plaintiff must have begun the grievance process within 30 days from the date of injury. Plaintiff's injuries occurred on April 24, 1999. He filed this lawsuit on August 26, 1999, well after the time for exhausting his administrative remedies had expired. The court **FINDS** that plaintiff has failed to fully exhaust his administrative remedies. Accordingly, this action is **DISMISSED** pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust the available administrative remedies.

In order to exhaust his administrative remedies, plaintiff must have begun the grievance process within 30 days from the date of injury. Plaintiff's injuries occurred on April 24, 1999. He filed this lawsuit on August 26, 1999, well after the time for exhausting his administrative remedies had expired. The court **FINDS** that plaintiff has failed to fully exhaust the administrative remedies that were available to him. Accordingly, this action is **DISMISSED** pursuant to 42 U.S.C. § 1997e(a).

Conclusion

For the foregoing reasons, this action is **ORDERED DISMISSED** pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies. The court dismisses all other pending motions as MOOT.

Plaintiff may appeal from this Opinion and Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days of the date of this Opinion and Dismissal Order.

If plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* is to be submitted to the Clerk, United States Court of Appeals, Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **DIRECTED** to send a copy of this Opinion and Dismissal Order to Plaintiff and counsel for Defendants.

IT IS SO **ORDERED**.

/s/ Jerome B. Friedman
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

July 11, 2001

UNITED STATES DISTRICT COURT

Eastern DISTRICT OF Virginia

Norfolk Division

FRANCIS J. WAWRZYNIAK,

Plaintiff,

v.

SGT. FOWLKES, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 2:99CV1680

(Filed Jul. 11, 2001)

[X] Decision by Court. This action came for decision before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant's motion to dismiss is GRANTED.

July 11, 2001
Date

Elizabeth H. Paret
Clerk

/s/ Betty E. Heck
(By) Betty E. Heck,
Deputy Clerk